Supreme Court, U.S.
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No. 99-3526

In The
Supreme Court of the United States

Roccine Taylor,

Petitioner(s)

v.

William J. Henderson,
In his official capacity as
Postmaster General for the
United States,

On Petition for Writ of Certiorari
TO THE UNITED STATES COURT OF APPEALS
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner, *Pro Se*

47pp

QUESTIONS PRESENTED

1. "Whether § 717 of the Civil Rights Act of 1964 as amended provides the exclusive judicial remedy for claims of discrimination in federal employment."

2. "Whether the Appeal Court erred by upholding the district Court judgment dismissing Taylor's Constitutional and intentional tort claims for failure to state. A claim upon which relief can be granted."

INDEX

OPINION BELOW..... 1

JURIDDICTION..... 1

RULES INVOLVED..... 1-3

STATEMENT OF THE CASE AND FACTS.....3

REASONS FOR THE WRIT.....7

CONCLUSION.....18

TABLE OF AUTHORITIES

CASES	PAGE
Abrams v. Johnson, 534 F2d 1226 (CA6).....	...7,8
Armstrong v. Manzo, 380 U.S. 545, 552(1965).....	..12
Board of Regents of State College v. Roth, 408 U.S. 564.....	..11
Bonham's Case, 8 Co114a, 118a, 77 Eng Rep 641, 652 (1610).....	..17
Camerson v. Seitz, 38 F.3d. 264, 270 (6th Cir. 1994).....	...9
Caro v. Shultz, 521 F.2d 1084 (CA7).....	..7
Chandler v. Roudebush, 425 U.S. 840 (1976)	6,7,8
Cleveland Board of Education v. Loudermill, 470 U.S. 532, 522 (1985).....	12,13
Conley v. Gibson, 355 U.S. 41, 47 (1957).....	9
Dugan v. Brooks, 818 F.2d 513, 516 (6th Cir. 1987).....	8
Hackley v. Roudebush, 171 U.S. App. D.C. 376, 520 F.2d 108.....	7

Kaiser v. United States Postal Service,
908 F.2d 47, (6th Cir. 1990).....11

Landgraf v. USI Film Producrs, 511 U.S.
244, 252-253 (1994).....16

Leatherman v. Tarrant Count, 507 U.S.
163, 178 (1993).....9

Mathews v. Eldridge, 424 U.S. 319,
333 (1976).....12

Mertik v. Blalock, 983 f.2d 1353, 1356
(6th Cir. 1993).....8

Scheuer v. Rodes, 416 U.S. 232, 236.....8

Smith v. Wade, 461 U.S. 30 (1983);
94 S.Ct. 1683, 1686.....16

Sperling v. Unites States, 515 F.2d
465 (CA3).....7

Texas Dept. of Community Affairs v. Burdine,
450 U.S. 248 (1981).....15

Yeager v. Local Union 26, Teamsters,
Chauffeurs, Warehousemen,
& Helpers of America, 6 Ohio St. 3d, 369,
453 N.E.2d 666(1983).....14

STATUES AND RULES

5 USC § 2108..... 12

5 USC § 7301..... 12

5 USC § 7501, 717.....7

5 USC § 7511 (a) (1) (West 1996).....12

28 USC § 1254 (1).....12

28 USC § 1346(b).....5

Civil Rights Act 1866, Section (1981) (1983).....10

Civil Rights Act 1964 as Amend, 42 U.S.C.
§ 2000e 16 (c).....5

Civil Rights Act of 1991(1991 Act),
105 Stat. 1071.....15,16

OTHER

Black Law Dictionary, Seventh Ed..... 12

Black Law Dictionary, 956-957, 1270
(6th ed, 1984).....16

Executive Order No. 11441.....12

Office of the Federal Equal Employment
Opportunity of the Civil Service Commission,
Discrimination Complaints Examiners
Handbook, 5 (April 1973) 14

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 20, 2000. Rehearing was denied on September 7, 2000.

OPINIONS BELOW

The decision of the Court of Appeals (App.1) is unreported. The opinion of the district court (App.5) is unreported. Judgment and Findings of the Merit System Protection Board (MSPB) (App.12).

JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). The judgment of the court of appeals (App.1) was entered on June 20, 2000. Rehearing was denied on September 7, 2000 (App4).

RULES INVOLVED:

This case involves the following federal rules of Civil Procedure, which provides: RULE 8(a)(2).

(a) A pleading, which sets forth a claim for relief, whether an original action, counterclaim, cross-claim, or third-party claim, shall contain…

(2) A short and plain statement of the claim showing that the pleader is entitled to relief.

RULE 52 FINDINGS BY THE COURT; JUDGMENT ON PARTIAL FINGINGS:

(a) Effect. In all actions tried upon the facts without jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. ...Judgment entered pursuant to rule 58; ... Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

(b) Amendment: ...when findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

(a) Judgment on Partial Findings. ...A trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without favorable finding on the issue...Such

a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

RULE 11(b) Representation to Court (b)(1)(3)(4)

(b) By presenting to the court (whether by signing, filing, submitting or later advocating) a pleading, written motion, or other paper, an attorney or unrepresentative party is certifying that to the best of the person's knowledge, information, and belief, formed after a inquiry reasonable under the circumstance.

(1) It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) The denials of factual contentions are warranted on the evidence or, if specifically so, identified, are reasonably based on a lack of information or belief.

STATEMENT OF THE CASE AND FACTS

Taylor is an African-American Female who is employed by the United States Postal Service (USPS). Taylor a career employee for seven years at the time of the action was suspended for six months. After six months of uncertainty, she was fired from her job with the USPS. The suspension and termination was for the same reasons; alleged threatening behavior of her daughter and herself. [1]Taylor was fired on January 13, 1996. Taylor was in the privacy of her home when she was notified of the placement on Indefinite Suspension without pay, until further notice. No reason was given.

January 15, 1996, Taylor received a letter via certified mail stating that she was being placed on "Emergency Indefinite-suspension, no-duty, no-pay status" for threats made by her daughter. January 16, 1996, Taylor took the letter to the office of the American Postal Workers Union (APWU). The representative informed Taylor that the letter was illegal and that they would get back with her. On January 17, 1996, Taylor received a third notice informing her of "Emergency Indefinite-suspension, no duty, no-pay status," alleging that Taylor threaten a supervisor. The notice was void of prescribed information, no name, time, or location was given.

Two days later, a postal inspector interviewed Taylor. On March 18, 1996, Taylor received a copy of the "Investigative Memorandum" prepared by the postal inspector. May 11, 1996, Taylor received a letter proposing the removal. Taylor, immediately contacted James O'Block, he told her to wait until notified. June 12, O'Block told her to meet him at the Administrative Building as soon as possible. The meeting lasted approximately 10 minutes. June 14, 1996, Taylor received the "Decision of Removal".

Taylor filed two complaints with the Merit System Protection Board (MSPB). The two complaints were joined. The hearing for both complaints was held on October 22, 1996. The Administrative Law Judge (ALJ) reversed the suspension and upholding the removal action. Taylor filed a timely appeal. On June 19, 1997, MSPB issued a judgment reversing both suspension and termination deciding the actions were unwarranted. Taylor was awarded back pay with interest and other benefits due. Rejecting her claim of retaliatory discrimination, intentional infliction of emotional distress, mental distress and other claims (App.20).

On August 18, 1997, Taylor filed a timely complaint in the United States District Court. A civil suit seeking relief for the intentional violation of the USPS. Taylor alleged that the USPS retaliated against her for filing a discrimination complaint and improperly removed her from her postal position, in violation of federally protected rights as a preference eligible veteran, violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-16 (c), the Federal Tort Claims Acts, 28 U.S.C.§ 1346(b), and the Fifth Amendment and Fourteen Amendments to the United States Constitution (App.22).

June 11, 1998 and June 22, 1998, Magistrate Judge Jack B. Streepy issued a Report and Recommendation that the USPS's motion for partial dismissal and motion for summary judgment was granted. United States District Judge Donald C. Nugent adopted the Report and Recommendations and dismissed all Taylor's following causes of action: (1) "Denied Due Process", (2) "Denied Rights As a Preference Eligible Veteran", (3) "Denied Rights Under The Collective Bargaining Agreement", (4) "United States Constitution 5thth Amendment", (5) "United States Constitution 14thth Amendment", (6) "Denied all Procedural Rights", (7) "Prohibited Personnel Practices", (8) "Discriminatory

Retaliatory Discrimination", (9) "Defamation, Libel, Slander", (10) "Tort of Outrageous Reckless Disregard", (11) "Intentional Infliction of Emotional Distress", (12) "Negligent Infliction of Emotional Distress", (13) "Mental Distress", (14) "Outrageous Conduct", and (15) "Mental Distress".

On February 3, 1999, U.S. Magistrate Judge Jack B. Streepy issued a final Report and Recommendation dismissing Taylor's remaining claims. U.S. District Judge Donald C. Nugent then adopted the final Report and Recommendation on March 31, 1999. Taylor subsequently filed a timely notice of appeal to the United States Court of Appeal Sixth Circuit. June 20, 2000, Appeals Court issued an order affirming the district court's decision. Taylor filed a timely petition for review with the Appeal Court. On September 7, 2000, the court issue and order confirming their decision stating that "Taylor has not cited any misapprehension of law or fact" that would alter their prior decision.

The Sixth Circuit erred in adopting the findings of the district court contrary to the Controlling Law discussed in Chandler v. Roudebush, 425 U.S. 840 (1976).

Nothing in the legislative history indicates that the federal sector "civil action" was to have the chameleon-like character, providing fragmentary *de novo* consideration of discrimination claims where "appropriate," ibid, and otherwise providing record review. On the contrary, the options, which Congress considered, were entirely straightforward. I faced a choice between record review of agency action based on traditional appellate standards and trial *de* novo to include those of private-sector employees, and the Senate's decision to treat private- and public sector employees alike in this respect was ratified by Congress as a whole. ibid.

REASON FOR GRANTING THE WRIT

The important of the legal doctrine of precedent (stare *decisis*), which rests on the presumption that justice, requires that persons in similar circumstances be treated similarly under the law. The Sixth circuit in this case has entered a decision in conflict with the decision of the United States Supreme Court of Appeals on the same important matter and has sanctioned such a departure by a district court, as to call for an exercise of this Court's supervisory power.

THE ISSUE OF TRIAL *DE NOVO*

The case of Chander v. Roudebush, 425 U.S. 840 (1976) arguably eradicated the conflict among the circuits concerning the nature of the judicial proceeding provided by §717(c). Subsequently, at least four other courts of appeals have held that 5 U.S.C. § 7501, 717© gives federal employees the right to a trial de novo in the district court. See, Abrams v. Johnson, 534 F.2d 1226 (CA6); Caro v. Shultz, 521 F.2d 1084 (CA7); Hackley v. Roudebush, 171 U.S. App. D.C. 376, 520 F.2d 108; Sperling v. United States, 515 F.2d 465 (CA3).

"Substantial Evidence" review cannot over come the clear import of the statutory language and the legislative history. The Congress was aware of the fact that federal employees would have the benefit of "appropriate procedures for an impartial [agency] adjudication of the complaint." And yet chose to give employees who had been through those procedures the right to file a *de novo* (App.3). "civil action" equivalent to that to that enjoyed by private sector employees.

The administrative disposition of federal employee discrimination complaints as an adequate basis for "substantial evidence" is inappropriate due to the fact that the system creates built-in conflict of interest. Chandler v. Roudebush, 425 U.S. 840 n.39, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976).

In Abrams v. Johnson, 534 F.2d 1228 (1976) the court held that the district court has discretion to admit the prior record (their arbitral) and give weight to the prior decision. But as we understand trial de novo, admission of an administrative record by no means precludes the taking of additional evidence or even rehearing the testimony of key witnesses. (App. 4). [2]

ISSUE OF DISMISSAL

In, Mertik v. Blalock, 983 F.2d 1353, 1356 (6th Cir. 1993) (citing Dugan v. Brooks, 818 F.2d 513, 516 (6thth Cir. 1987)). On a Fed. R. Civ. P. 12(b)(6) motion, all of the allegations contained in plaintiff's complaint are accepted as true, and the complaint is construed liberally in favor of the party opposing the motion. (App. 13)

In, Scheuer v. Rodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, the Supreme Court explained: "When a federal court reviews the sufficiency of a complaint before the reception of any evidence...its task is necessarily a limited one. The issue is not whether the plaintiff is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test".

It is not the function of the court to weigh evidence or evaluate the credibility of witnesses. "Instead, the court should deny the motion unless it is clear that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. See, Camerson v. Seitz, 38 F.3d 264, 270 (6th Cir. 1994).

The Sixth Circuit in this case erroneously dismissed Taylor's claims for failure to state a claim upon which relief can be granted (App.3). Federal notice pleading requires only that the plaintiff "set out in her complaint a short and plain statement of the claim that will provide the that will provide the defendant with fair notice of the claim. To survive a motion to dismiss a sec. 1983 action plaintiff must allege facts, which show that the defendant acting under color of state law, intentionally and unlawfully deprived the plaintiff of a constitutional right. (cited omitted). The Court has repeatedly stated that the "short and plain statement of the claim in Rule 8(a)(2) meant what is said." See, Conley v. Gibson, 355 U.S. 41, 47 (1957), Leatherman v. Tarrant County, 507 U.S. 163, 168 (1993)

As to Counts Two and Seven, where Plaintiff alleges that she was denied certain procedural and substantive rights as a preference eligible postal employee, the Magistrate Judge Jack B. Streepy decided that because Taylor was reinstated to her former position and awarded back pay with interest and benefit due her claim of "intentional infliction of emotional distress, mental distress, victim of outrageous conduct, and deprivation of federally protected property rights should be dismissed.

On March 16, 1996, the USPS issued the following statement to the MSPB as part of "Agency's Motion To Dismiss – Board Lacks Jurisdiction",

The agency chose to cancel the emergency placement action and thus, have appellant remain on the clock but off the job. " (JA, 6th Cir. Appeal, pg37).

"Discrimination" is, generally, failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored. Taylor claims that USPS violated Title VII of the Civil Rights Act, 42 USC, Section e)(2), which reads in pertinent parts as follows:

(a) It shall be an unlawful employment practice for an employer.

(1) To fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) To limit, segregate, or classify his employees or applicants for employment in any way, which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or origin. Section 704 (a) of the Civil Rights Act provides as follows:

"It shall be unlawful for an employer to discriminate against any employee... because such individual, has made a charge...or participated in any manner in an investigation, proceeding or litigation under [this Act]."

Sections 1981 and 1983 of the Civil Rights Act of 1866 also encompasses claims of discrimination in retaliation for an employee's actions to enforce rights under this law. USPS knew that Taylor had filed several complaints with the EEOC; they knew Taylor had been denied due process by placement on emergency indefinite suspension without pay for more than 14 days and subjected to adverse employment action. USPS and APWU met together to conspire on how to deprive Taylor of her due process rights. (APWU informed USPS that the first notification was illegal informing them that the "charge of making a threat had to come from Taylor, not her adult daughter," Therefore, USPS issued a second letter alleging, "Taylor had made a threat. Count three of Taylor's complaint states that she was denied certain rights under a collective bargaining agreement The Magistrate Judge cited Allis-Chalmers Corp v. Lueck, 471 U.S. 202, 219 (1985); Kaiser v. United States Postal Service, 908 F.2d 47, 47 (6thth Cir. 1990) stating that to successfully bring a claim pursuant to a collective bargaining agreement, an individual must exhaust the grievance and arbitration procedures. Taylor's statement in her initial complaint item #71 indicates that she approached the union only later to realize they were working with the agency officials.

The union never took a statement from Taylor nor did they initiate a step one-step two-step three grievance. Taylor was forced to wait more than 14 days in order to file with MSPB.

In Board of Regents of State College v. Roth, 408 U.S. 564, the Supreme Court discussed in a number of cases what equals a protectable interest. In Roth, the court held the protected property interest must be found in some law outside of the constitutional due process guarantees, which creates more than a unilateral expectation of a benefit. The external law must create a legitimate claim of entitlement. Id.at 577.

Due process is defined as "the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to fair hearing before a tribunal with the power to decide the case." (Black 's Law Dictionary, Seventh Ed.)

The Veterans' Preference Act authorizes Civil Service Commission appeals from adverse agency decision. See, 5 USC § 7701. The act itself applies only to veterans of military service, 5 USC §§ 2108, 7511 [5 USC §§ 2108, 7511], but Executive Order No. 11441, printed in note following 5 USC § 7301 [5 USCS § 7301], extends the Act's protection to all non-preference eligible employees in the classified service. A federal employee in the competitive service, is entitled by statue to serve in his job without fear of dismissal except for cause, must be given evidentiary hearing before she is discharged. *Id.*

Covered employees, such as Taylor, are entitled to certain statutory protections including 30 days advance written notice, a reasonable time to answer, orally and in writing, the reasons given by the agency for the adverse action, and written decision and the specific reasons therefore at the earliest practicable date. 5 USC § 7511(a)(1)(West 1996). When there are factual disputes that pertain to the validity of a deprivation, due process "require[s] more than a simple opportunity to argue or deny". See, Cleveland Board of Education v. Loudermill, 470 U.S. 532, 552 (1985) (App.3).

The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' Mathews v. Eldridge, 424 U.S. 319, 333 (1976) quoting, Armstrong v. Manzo 380 U.S. 545, 552, (1965). The Court has upheld procedures

affording less than a full evidentiary hearing if "some kind of a hearing" ensuring an effective "initial check against mistaken decision" is provided before the deprivation occurs, and a prompt opportunity for a complete administrative and judicial review is available. Loudermill, supra, at 542, 545, quoting Roth, supra at 569-570.

Courts have previously acknowledged the "severity of depriving a person of the means of livelihood." Id. at 543. "While a fired worker may find employment elsewhere doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job."

In light of the injurious effect, a retaliatory discharge can have on an employee's financial status and prospects for alternative interim employment; the employee's substantial interest in retaining her job must be considered. In, Loudermill, the Court considered the temporary deprivation of a state government employee's right not to be discharged without cause, indication that the employee was entitled to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" before the temporary discharge took effect.

THE HEARING PROCEDURE

Despite congressional criticism that agency's responsibility for investigating and judging complaints lodged against it produces an appearance of unfairness, and that the system creates a built in conflict of interest, the head of an agency may still reject a complaint under certain circumstances or cancel a complaint for "failure to prosecute," and the provisions under which the defendant agency preliminarily investigates the charges are not modified in any relevant way.

The hearing procedures are only cosmetically altered, with the "hearing examiner" now denominated a "complaint examiner" but with the practical limitations on his independence and the fact that ultimate decision making authority rests with the agency head persisting under the revised procedures. The examiner need no legal training, and no rules of evidence govern the hearing; hearsay is explicitly rendered admissible and examiners are informed that the concept of "burden of proof" has no applicability to the hearing process.

Moreover, the complaint examiner delineates the issues, and he rather than the complainant molds the agency record. And particularly important in evaluating the credibility of the agency proceedings as adequate fact-finding mechanisms, the examiner has no subpoena power and thus neither the complainant not the examiner has the right to conduct discovery or secure compulsory process. Indeed, the CSC has frankly recognized that, "The hearing process is an adjunct to the investigation. It is not and adversary Proceeding but is an administrative proceeding designed to provided additional Evidence." Office of the Federal Equal Employment Opportunity of the Civil Service Commission, Discrimination Complaints Examiners Handbook, 5 (April 1973) (emphasis in original).

Furthermore, the head of the employing agency still makes the final decision on the complaint. Therefore, the CSC has not lived up to §717 and has not implemented procedures that meet congressional concerns, the CSC's non adversarial fact-finding procedures and inherent structural defects persist essentially unchanged, and do not guarantee federal employee's a full and fair hearing on their claims of employment discrimination[1]. Hackley v. Roudebush, supra, 171 U.S. App. D.C. 376, 520 F.2d at 137-41.

DISMISSAL OF CONSTITUTIONAL AND INTENTIONAL TORT CLAIM

The Ohio Supreme Court recognized the tort of intentional infliction of emotional distress. Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of America, 6 Ohio St. 3d, 369, 453 N.E.2d 666 (1983). In Yeager, the court articulated the requirements for a successful claim, saying that "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm, "Id. at 671." Thus in order to state a claim for intentional infliction of emotional distress in Ohio, a plaintiff must allege that (1) defendants intended to cause emotional distress, or knew or should have known that their actions would result in plaintiff's serious emotional distress, (2) defendants conduct was extreme and outrageous, (3) defendants' actions proximately caused plaintiff's emotional injury, and (4) plaintiff suffered serious emotional anguish. (R, #1).

The upreme Court has recognized the difficulty a plaintiff has in proving discriminatory motive by direct evidence. See, Burdine, 450 U.S. at 256, 101 S.Ct. at 1095. Intent ordinarily may not be proved directly because there is no way of fathoming or scrutizing the operation of the human mind. A person intent maybe infer from surrounding circumstances, consideration to any statement made or act done or omitted by a party whose intent is in issue, and all other factors and circumstances which indicate his or its state of mind.

DAMAGES

Under the terms of the Civil Rights Act of 1991 (1991 Act), 105 Stat. 1071. Punitive damages are available in

claims under Title VII of the Civil Rights Act of 1964 (Title VII), 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* Punitive damages are limited, however, to cases in which the employer has engaged in intentional discrimination and has done so "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." Rev. Stat. § 1977, as amended, 42 U.S.C. § 1981a(b)(1).

Prior to 991, only equitable relief, primarily back pay, was available to prevailing Title VII plaintiffs; the statue provided no authority for an award of punitive or compensatory damages. See, Landgraf v. USI Film Products, 511 U.S. 244, 252-253 (1994). With the passage of the 1991 Act, Congress provided for additional remedies, including punitive damages, for certain classes of Title VII and ADA violations. The 1991 Act limits compensory and punitive damages awards, however, to cases of "intentional discrimination"-that is, case that do not rely on the disparate impact" theory of discrimination 42 U.S.C. §1981a(a)(1). The Act further qualifies the availability of punitive awards:

> "A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or *with malice or with reckless indifference to the federally protected rights of an aggrieved individual."* (Emphasis added) The term "malice" that it may be acting in violation of federal law, not awareness that it is engaging in discrimination. The Court gains an

understanding of the meaning of the terms "malice" and "reckless indifference," as used in §1981a, from this Court's decision in Smith v. Wade, 461 U.S. 30 (1983). Furthermore, concluding that the terms "malice " and "reckless" ultimately focus on the actor's state of mind. See, e.g., Black's Law Dictionary 956-957, 1270 (6th ed, 1984) (defining "willful," wanton," and "reckless").

A suit for damages is the only effective remedy. Taylor prays to recover damages for loss of reputation, mental anguish, emotional stress, and anxiety caused to her by USPS conduct; (1) "Negligence" is the failure to exercise the standard of care that a reasonable prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, (2) "Negligent Infliction of Emotional Distress" is a tort of causing another severe emotional distress through one's negligent conduct, (3) "Intentional Infliction of Emotional Distress" is a tort of intentionally or recklessly causing another person severe emotional distress through one's extreme or outrageous acts, (4) "Recklessly" is characterized by the creation of a substantial and unjustifiable risk of harm to another and by conscious and/ or deliberate disregard for or indifference to that risk. Reckless conduct is much more than mere negligence; it is the state of mind in which a person does not

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Footnote[1] Deborah Noe, white female manager of Lyndurst, Mayfield Branch and official head of that insulation. Taylor filed several EEOC against Noe, alleging discrimination, creating hostile work environment and subsequently adverse personnel action. Noe was the decision maker and prosecutor. "No man shall be a judge in his own cause," Bonham's case, 8 CO 114a, 118a, 77 Eng. Rep. 641, 652 (1610).

care about the consequences of his action, (5) "Outrageous Conduct" is conduct so extreme that it exceeds all reasonable bounds of human decency, (6) "Emotion Distress" is highly unpleasant mental reaction (such as anguish, grief, embarrassment, anger, humiliation, shame, worry or nausea) that results from another person's conduct. The intensity and duration of the distress are factors to be considered in determining its severity, and a defendant's conduct is in itself important evidence that the distress has existed.

In addition to damages mention, if the law permits under certain circumstances, an award to injured person punitive damages in order to punish a defendant for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

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APPENDIX

No. 99-3526
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROCCINE TAYLOR,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
WILLIAM J. HENDERSON, in his official capacity as Postmaster General for the United States,	)	
	)	
Defendant-Appellee.	)	
	)	

Before: KRUPANSKY, NORRIS, and SUHRHEIENRICH, Circuit Judges.

Roccine Taylor appeals pro se from a district court judgment that dismissed her civil rights action, filed under diverse theories of state and federal law. Her appeal has been referred to a panel of this court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, the panel unanimously agrees that oral argument is not needed in this case. Fed. R. App. P. 34(a).

Taylor is an African-American who is employed by the United States Postal Service ("USPS"). She was suspended and later terminated based on the alleged threatening behavior of her daughter and herself. The Merit Systems Protection Board ultimately reversed Taylor's suspension and termination, even though t rejected her claims of retaliatory discrimination.

Taylor listed the following claims in her civil rights complaint: (1) "Denied Due Process"; (2) "Denied Rights As a Preference Eligible Veteran"; (3) "Denied Rights Under The Collective Bargaining Agreement"; (4) United States Constitution 5th Amendment"; (5) "United States Constitution 14th Amendment"' (6) "Denied All Procedural Rights"; (7) "Prohibited Personnel Policies"; (8) "Discriminatory Retaliation"; (9) "Defamation, Libel, Slander"; (10) "Tort of Outrage Reckless Disregard"; (11) "Intentional Infliction Of Emotional Distress"; (12) "Negligent Infliction of Emotional Distress"; (13) "Mental Distress"; (14) "Outrageous Conduct"; and (15) "Mental Distress."

A magistrate judge initially recommended that Taylor's first, fourth, fifth and ninth through fifteenth claims be dismissed. In a second report, he recommended that the defendant be awarded summary judgment on Taylor's eighth claim. The district court adopted these recommendations on July 7, 1998, and dismissed Taylor's first, fourth, fifth, and eighth through fifteenth claims. The magistrate judge then issued a third report, in which he recommended the dismissal of Taylor's remaining claims. The court adopted this report and finally dismissed the case on April 1, 1999.

Taylor's brief does not contain any effective challenge to the district court's rationale for dismissing her second, third, sixth, seventh, and eighth claims. Thus, she has abandoned these claims for purposes of appellate review. See Kocsis v. Multi-Care Mgmt., 97 F.3d 876, 881 (6th Cir.1996). Nevertheless, we note that the dismissal of Taylor's eighth claim was proper, as she did not show that the reasons asserted for the defendant's actions were merely a pretext for discrimination.

See Wixson v. Dowagiac Nursing Home, 87 F.3d 164, 169-71 (6th Cir.1996).

Taylor forfeited her remaining claims by not filing any objections to the magistrate judge's first report, which indicated that they were not cognizable in a federal civil rights action. See Miller v. Currie, 50 F.3d 373,380 (6th Cir. 1995). We note, nonetheless, that all of Taylor's remaining federal claims were properly dismissed because the Civil Service Reform Act provides a comprehensive scheme for addressing them. See Jones v. Tennessee Valley Auth., 948 F.2d 258, 263-64 (6th Cir. 1991). Thus, the district court acted within its discretion by dismissing any claim that Taylor may have had under state tort law. See United Mine workers of Am.v. Gibbs, 383 U.S. 715, 726 (1966).

Taylor now argues that the defendant violated her right to equal protection because Ohio Rev. Code§2745.01 impermissibly limits the liability of employers who are sued for intentional torts by their employees. However, Taylor did not raise this claim in her civil rights complaint, and we will not reach it for the first time on appeal. See Barker v. Shalala, 40 F.3d. 789, 793-94 (6th Cir. 1994).

We have reviewed Taylor's remaining arguments, and they are all lacking in merit. Accordingly, the district court's judgment is affirmed. Rule 34(j)(2)(C). Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT
/s/ LEONARD GREEN, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OR OHIO
EASTERN DIVISION

ROCCINE TAYLOR,	) CASE NO.
	) 1:97CV1884
Plaintiff,	)
	)
v.	) JUDGE DONALD
	) C. NUGENT
WILLIAM J. HENDERSON,	)
[1]Postmaster General	) MEMORANDUM
	) OPINION
	) AND ORDER
Defendant.	)
	) DATE:March 31,1999

This matter comes before the Court upon the Report and Recommendation of a Magistrate Judge of this Court submitted on February 3, 1999 (Document #43) which recommends that Defendant's Motion to Dismiss (Document #42) and Motions to Amend Complaint (Document #32, #33) be denied. For the reasons that follow, the named Report is herby ADOPTED by this Court, along with the findings of fact and conclusions of law therein.

Plaintiff Roccine Taylor filed this pro se action on July 18, 1997, alleging violations of within Complaint. Title VII of the Civil Rights Act of 1964,

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[2] William J. Henderson replaced Marvin T. Runyon as Postmaster General subsequent to the filing of this lawsuit.

42 U.S.C. §§2000e-16(c), the Federal Tort Claims Act, 28 U.S.C. §1346(b), and the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiff alleged that Marvin T. Runyon[2], in his capacity as Postmaster General for the United States, wrongfully suspended and removed her from her position as a postal clerk and that he retaliated against her for filing an EEOC complaint.

Defendant filed a Motion for Partial Dismissal (Document #14) on December 24, 1997 and a Motion for Summary Judgment (Document # 21) on March 6, 1998. The Court referred this matter to Magistrate judge Jack B. Streepy for the preparation of a Report and Recommendation as to these motions. On June 11, 1998, Magistrate Judge Streepy issued a Report and Recommendation recommending that Defendant's Motion for Partial Dismissal be granted (Document #29). Thereafter, on June 22, 1998, Magistrate Judge Streepy issued a second Report and Recommendation (Document #30) recommending that Defendant's Motion for Summary Judgment is granted. This Court adopted the Magistrate Judge's Reports on July 6, 1998. Consequently, Counts One, Four, Five, Nine, Ten, Dleven, Twelve, Thirteen, Fourteen, and Fifteen of Plaintiff's Complaint have been dismissed; and summary judgment has been granted as to Cont Eight.

On September 11, 1998, Defendant filed a Motion to Dismiss Plaintiff's Remaining Claims (Document #41). These claims include the following" (1) Count Two-"Denied Rights as a Preference Eligible Veteran"; (2) Count Three-"Denied Rights Under the Collective Bargaining Agreement"; (3) Count Six-"Denied all Procedural Rights"; and (4) Count Seven-"Prohibited Personnel Practices."

Subsequently, Plaintiff filed a Counter Motion for Summary Judgment (Document #42)

on September 14, 1998. On February 3, 199, Magistrate Judge Streepy issued a Report and Recommendation recommending that Defendant's Motion to Dismiss be granted and that Plaintiff's counter Motion for Summary Judgment and her Motions to amend the Complaint be denied. Plaintiff filed Objections to the Report and Recommendation of the Magistrate Judge, along with Plaintiff's Objections/Motion to Amend Complaint, are herein reviewed by the Court.

Factual Background

The following factual summary is based upon depositions, affidavits, and exhibits filed in this case as well as the review of the facts in the prior Reports and Recommendations of Magistrate Judge Streepy. Those material facts, which are controverted and supported by deposition testimony, affidavit, or other evidence, are stated in the light most favorable to Plaintiff, the Non-moving party.

Plaintiff initiated an informal discrimination complaint against the United States Postal Service (hereinafter "USPS") with the Equal Employment Opportunity Commission (hereinafter "EEOC") on September 26, 1995. The complaint consisted of alleged conflicts Plaintiff had with her supervisor, Ms. Deborah Noe. Thereafter, on December 18, 1995, the EEOC filed a formal discrimination complaint against the USPS.

Following certain alleged threatening comments made by Plaintiff's daughter to USPS employees, the USPS sent Plaintiff a notice suspending her without pay pending the outcome of and investigation. That notice

was rescinded and superseded the next day by and amended notice-suspending Plaintiff without pay pending an investigation of reports that Plaintiff had boasted about her daughter's alleged threats and that Plaintiff had personally threatened her supervisor.

The USPS conducted a comprehensive investigation of the above allegations, corroborating the charges indicated in the amended notice to Plaintiff. As such, a notice was sent to Plaintiff of a proposal to remove her from the USPS for conduct unbecoming to a postal worker and for threatening harm to postal employees. On June 8, 1996, the USPS sent Plaintiff a "letter of decision" stating that it found the charges against her "fully supported by the evidence." Accordingly, Plaintiff was removed effective June 14, 1996.

Plaintiff appealed the decision of the USPS. The Administrative Law Judge (hereinafter "ALJ's decision regarding . Plaintiff's removal, finding that the USPS had failed to present adequate evidence at the hearing. The MSPB ordered the USPS to cancel Plaintiff's suspension, effective January 3, 1996, and to reinstate her, effective June 14, 1996. Plaintiff was also awarded back pay with interest and benefits due.

Standard of Review for Magistrate Judge's Report and Recommendation

The applicable district court standard of review for a magistrate judge's Report and Recommendation depends upon whether objections were made to that report. When timely objections are made to a Report and Recommendation of a magistrate judge, the district court

report. When timely objections are made to a Report and Recommendation of a magistrate judge, the district court reviews the case de novo. FED.R.CIV.P.72(b) provides this standard of review. It states, in pertinent part, the following:

> The district judge to whom the case is assigned shall make a *de novo* determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Accordingly, this Court will review the Report and Recommendation, to which timely objections have been filed, de novo. See Dacas nursing Support Systems, Inc v. N.L.R.B.,7F.3d 511 (6th Cir. 1993).

Conclusion

The Court had reviewed the Report and Recommendation of the instant *cade de nove*. The Court had also considered all of the pleadings, affidavits, motions, and filings of the parties. The Court herby adopts the findings of fact and conclusions of law of the Magistrate Judge as its own.

Concerning Defendant's Motion to Dismiss Plaintiff's remaining claims, Magistrate Judge Streepy correctly determined that Plaintiff fails to state a claim upon which relief can be granted as to all remaining .

counts. As such, Defendant's Motion to Dismiss should be granted. As to Counts Two and Seven, wherein Plaintiff alleges that she was denied certain procedural and substantive rights as a preference eligible postal employee, Plaintiff cannot state a claim as a matter of law. Exhibit 13 of Plaintiff's Complaint demonstrates that the MSPB found in Plaintiff's favor, reinstating her to her former position and awarding her back pay with interest and benefits due. Therefore, as a result of this favorable decision if the MSPB, Plaintiff cannot show that she suffered a denial of this favorable decision of the MSPB, Plaintiff cannot show that she suffered a denial of her procedural or substantive rights. Accordingly, Counts Two and Seven are dismissed

Count Three of Plaintiff's Complaint states that Plaintiff was denied certain rights under a collective bargaining agreement. In order to successfully bring a claim pursuant to a collective bargaining agreement, an individual must exhausted the necessary grievances procedures. Therefore, Plaintiff fails to state a claim upon which relief can be granted as to Count Three of her Complaint; and it is accordingly dismissed.

Finally, Plaintiff alleges in Count Seven of her complaint that her removal by the USPS was a "prohibited personnel practice" in violation of 6U.S.C. § 2302 (b)(4), (b)(8)(A), (b)(9), and (b)(10). However, the USPS is exempt from the above statutory provision. According to section 2302, "personnel action" as that word is defined," and the definition of "agency" in section 2302(a)(2)(C) does no include the United States Postal Service. Booker v. Merit Systems Protection Board, 982 F.2d 715, 519 (Fed. Cir. 1992). According, Plaintiff fails to state a claim upon which relief can be granted. Defendant's Motion to Dismiss as to Count Seven is granted.

With regards to plaintiff's "Counter Motion for Summary Judgment," this Court finds such motion without the merit. Plaintiff fails to articulate an argument, or

counts contained in her Complaint. Likewise, any allegations contained within her motion do not address issues contained within Defendant's Motion to Dismiss.

Moreover, Plaintiff's Objection s/Motion to Amend Complaint fail to provide this Court with any basis upon which to reject the Magistrate Judge's Report and Recommendation

Finally, concerning Plaintiff 's apparent Motions to Amend Complaint, filed also as Objections to the Report and Recommendations of June 11, 1998 and June 22, 1998, Magistrate Judge Streepy stated that such motions were implicitly denied when this Court adopted the above Reports and Recommendations; and assuming there had not been a ruling, the motions should be denied. On July 2, 1998, this Court denied Plaintiff's Motion to Amend the Complaint. Therefore, Magistrate Judge Streepy was correct in recommending that the Court deny the above.

DATED: March 31, 1999

/s/ DONALD C. NUGENT
DONALD C. NUGENT

United States District Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROCCINE TAYLOR, Appellant,	DOCKETNUMBERS CH-0752-960267-I-I CH-0752-96-0740-I-I
v.	
UNITED STATES POSTAL SERVICE, Agency,	DATE: June 19 1997

Roccine Taylor, Garfield Heights, Ohio, pro se
Michael K. Brown, Esquire, Cincinnati, Ohio, for the agency,

BEFORE

Ben L, Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member
Member Amador issues a dissenting opinion.

OPINION AND ORDER

The appellant petitions for review of the November 21,1996 initial decision in these joined appeals that reversed her suspension and affirmed her removal. For the reasons set forth below, we GRANT the petition for review, REVERSE the portion of the initial decision that affirmed the removal, and AFFIRM the remaining portions of the initial decision; the appellant's removal is REVERSED.

BACKGROUND

The agency placed the appellant on "emergency" suspension from her Distribution Clerk position because it believed that the appellant and her daughter had threatened agency employees. The appellant, who is a preference-eligible, filed a timely pro se appeal. See Initial Appeal File (IAF) ('0267), Tab 1 at 7, 8. The agency later removed the appellant for threatening to harm an agency employee (based on the same alleged incident that led to the suspension), and the appellant filed a timely appeal from that action. See IAF ('0740), Tab 1. The administrative judge joined the two appeals. Id., Tab 3.

The agency did not file the materials required by the acknowledgment order issued in the removal appeal, which would have included the adverse action file, nor did it respond to the appellant's motion for sanctions or the administrative judge's "Second Order to Respond." See IAF ('0740), Tabs 2, 5, 6. Accordingly, the administrative judge imposed the sanction of "deny[ing] the agency the right to introduce additional evidence supporting its case-in-chief against the appellant." Id., Tab 10. After a hearing, the administrative judge reversed the suspension on the ground that the agency effected it without following statutorily-prescribed procedures, and found the appellant's claims of race discrimination, sex discrimination, and reprisal for filing discrimination complaints not proven. Notwithstanding the sanction imposed on the agency, however, the administrative judge, relying in part on evidence introduced jointly at the hearing, found that the agency proved that the appellant made a threat, and affirmed the removal. IAF ('0740), Tab 15.

The appellant argues in her timely petition for review and timely supplements thereto that the agency did not prove that she made a threat. [1] She also argues that: The administrative judge's findings relative to the suspension are incorrect; the agency committed harmful procedural error when it removed her; she should have been afforded interim relief; and the agency discriminated against her. Petition for Review File, Tabs 1, 3, 5. The agency has not responded to the appellant's submissions.

ANALYSIS

The agency did not prove that the appellant made a threatening statement; accordingly, her removal is reversed.

On January 11, 1996, the appellant's daughter telephoned John Bradfield, a supervisor at the agency, to complain about the way Chris Cooper, another supervisor, was treating her mother. Bradfield informed an agency official that the appellant's daughter had threatened to harm Cooper during that conversation. The agency later came to believe that on January 12, 1996, the appellant said she would "shoot John Bradfield" if her daughter "got into trouble." The agency removed the appellant on charges of "Conduct Unbecoming a Postal Employee" and "Threatening Harm to Postal Employee, " both of which were based on the appellant's alleged threat. See IAF ('0740), Tab 1 at 7-8.

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[1] The appellant has made three submissions on review, all of which were filed prior to the deadline for filing a petition for review.

The agency bears the burden if proving its charge by a perponderance of the evidence. 5 U.S.C § 7701 (C) (1) (B); 5 C.F.R. § 1201.56 (a) (1) (ii). As noted above, the administrative judge precluded the agency from introducing evidence in support of its case beyond that which had already been submitted as of the date that he imposed sanctions, yet he convened a hearing notwithstanding the appellant's motion for default and then he went on to sustain the charge. This was error, as explained below.

The appellant called Barbara Shirley, Supervisor of Customer Services, as a witness. Shirley testified that she was looking for the appellant between noon and 1:00 p.m. on January 12, 1996 when she heard the appellant and Clyde Brown, Custodian, talking in the utility room. Hearing Tape (HT) 1 A. Shirley testified that the appellant "was discussing with Mr. Brown what her daughter had did, uh, told Mr. Bradfield and that, uh, he was, she was going to shoot Chris Cooper." HT 1B. When asked what else she overheard, Shirley testified: "I didn't hear anything else [be]cause that's when I interrupted." Id. Shirley further testified that a few minutes later, Brown told her that the appellant had said that "if anything happens to her daughter that she's going to shoot Mr. Bradfield." Id.

The appellant admitted that she talked with Brown in the utility room, but denied making the statement about shooting Bradfield. HT 2A.

The appellant gave direct testimony about her conversation with Brown, whereas Shirley's Testimony was hearsay, that is, Shirley testified to what Brown told her the appellant said. See Fed. R. Evid. 801 (c) (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). The administrative judge noted that direct testimony is normally

given more weight than hearsay, but he then went on to conclude that Shirley's hearsay testimony was more persuasive than the appellant's direct testimony under the circumstances. Cf. Reniere v. Department of Agriculture, 62 M.S.P.R. 648, 652 (1994) (the probative value of hearsay depends on the particular circumstances of a case). We disagree with this conclusion, for four principal reasons.

First, Brown did not testify at the hearing. The appellant had requested Brown as a witness, and the administrative judge had ordered the agency to ensure his attendance at the hearing. See IAF ('0740), Tab 12 at 2. An agency must make an employee available to testify at a Board hearing when ordered by the administrative judge to do so; employees "will be in official duty status" while testifying. 5 C.F.R. § 1201.33. At the hearing, the agency representative stated that Brown was "out of town" and on leave, and would not be available to testify. HT 2A-2B. [She did not say why the agency did not ensure that Brown was in town and not on leave.] The agency failed to show good cause for not meeting its obligation to ensure Brown's attendance at the hearing detracts from the probative weight of Shirley's hearsay testimony about what Brown told her. Bf. Womack v. U.S. Postal Service, 70 M.S.P.R. 285, 292-93 (the agency's failure to explain why it did not call a witness, Ingram, at the hearing detracted from the probative weight to be given another employee's hearsay testimony about what Ingram supposedly said), aff'd, 99 F.3d 1160 (Fed. Cir. 1996)(Table).

To the contrary, the appellant is entitled to an inference in her favor due to the agency's failure to show good cause for Brown's unavailability. Under 5 C.F.R. § 1201.43 (a) (1), when a party does not comply with an administrative judge's order to provide information to the opposing party, the administrative

judge may impose the sanction of drawing an inference in favor of the party requesting the information. In Worrell v. Department of the Treasury, , (1985), the Board raised but found it unnecessary to resolve the question of whether an administrative judge may, by analogy to draw an inference in favor of the appellant when the agency fails to comply with an order to make a witness available to testify.

Without establishing any blanket rule concerning the issue raised in Worrel, we hold that, in this particular case, the administrative judge should have inferred that Brown's testimony would have supported the appellant's version of events. Brown and the appellant are the only witnesses with firsthand knowledge of whether the appellant threatened to shoot Bradfield, and the appellant's summary of Brown's anticipated testimony in her prehearing submission makes plain that she expected Brown would not support the agency's version of events. See IAF ('0740), Tab 12 at 2. In order to serve the ends of justice, 5 C.F.R. § 1201.43 (a) (1), we find that the agency's failure to show good cause for not making Brown available results in an inference that Brown's testimony would have been favorable to the appellant. Cf. Askew v. Department of Transportation, , 707-08 (1983) (where the agency presented a prima facie case in support of its charge, the administrative judge was permitted to draw an adverse in inference from the appellant's decision not testify in rebuttal); accord Book v. U.S. Postal Service, 6 M.S.P.R. 378, 380-81 (1981), aff'd, 675 F.2d 158 (8th Cir. 1982).

Second, contrary to the initial decision, [2] see IAF ('0740), Tab 14 at 8, Brown's handwritten note is not strong evidence corroborating Shirley's testimony. The note provides:

1-16-96

On 12 of Dec 96 Miss Roccine, stated to me Clyde Brown that if something happen to Briggite, that was going to shoot Mr. Bradfield.

Clyde R. Brown

IAF ('0740), Tab 13, Ex. 1. The note itself is unsworn hearsay, and unclear hearsay at that. See Scott v. Department of Justice, 69 M.S.P.R. 211, 229 (1995) (imprecision detracts from the probative value to be given hearsay evidence), aff'd, 99 F.3d 1160 (Fed. Cir. 1996) (Table). The note, dated January 16, 1996 as if it had already taken place. Even assuming that the note was intended to refer to Brown's conversation with the appellant on January 12, 1996, the note is ambiguous as to who "was going to shoot Mr. Bradfield." Plainly Brown left out at least one word between "that" and "was," and we have no way of knowing whether the missing word or words should have been "Roccine" (the appellant), "Brigitte" (the appellant's daughter), or someone.

Else altogether. Particularly in light of the fact that the agency did not ensure Brown's attendance at the hearing, where he could have been questioned under oath about the note, we find that it was error for the administrative judge to have found such a note corroborating evidence for Shirley's testimony. Third, Shirley was interviewed by a Postal Inspector on January 19, 1996 and gave a detailed account of the events of January 12. Shirley's statement to the Postal Inspector makes no mention of Brown's alleged statement to her that the appellant had threatened

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[2] In the initial decision, the administrative judge expressly referred to Brown's note as "evidence presented by the agency," IAF ('740), Tab 15 at 8, even though he had previously precluded the agency from introducing further evidence.

Bradfield. See IAF ('0267), Tab 11 (Ex. K to Investigative Memorandum). In other words, Shirley's own statement to an investigator just five days after the day in question provides no corroboration for her testimony at the hearing. Cf. Womack, 70 M.S.P.R. at 292 (the extent of corroborating evidence in the record is a factor to consider in assessing the probative weight of hearsay).

Fourth, as noted above, Shirley's hearsay testimony is contradicted by the appellant's live, direct testimony. See Womack, 70 M.S.P.R. at 292 (live, direct testimony. See cross-examination that contradicts hearsay detracts from the probative weight to be given the hearsay). In this connection, we note that the appellant's testimony is fully consistent with the statement she gave to the Postal Inspector. See IAF ('0267), Tab 11 (Ex. B to Investigative Memorandum).

In light of the factors discussed above, Shirley's hearsay testimony about what Brown supposedly said does not outweigh the appellant's direct testimony under oath in which she denied threatening Bradfield. We find that the agency failed to carry its burden of proving that the appellant said that she would shoot Bradfield if anything happened to her daughter. Accordingly, the agency did not prove either that the appellant engaged in "Conduct Unbecoming a Postal Employee" or that she "Threaten[ed] Harm to Postal Employees."

The appellant's removal is REVERSED.

The appellant's remaining arguments either need not be reached or do not demonstrate error by the administrative judge.

We have already held that the appellant's removal must be reversed because the agency did not prove its charge, so we need not reach her argument that the agency committed harmful procedural error when it removed her. Furthermore,

The administrative judge reversed the appellant's suspension, and ordered the agency to cancel that action. Accordingly, we need not address the appellant's arguments concerning the administrative judge's findings and conclusions in the suspension appeal. We have already held that the appellant's removal must be reversed because the agency did not prove its charge, so we need not reach her argument that the agency committed harmful procedural error when it removed her.

Furthermore, because the administrative judge upheld the appellant's removal, he was correct not to order interim relief. Additionally, the appellant's contention on review that the agency discriminated against her based on race and sex is a pro forma assertion; she has no shown that the administrative judge made any error with respect her discrimination claims. Finally, the appellant does not contest the administrative judge's findings on her reprisal claim, and we discern no reason to reopen the appeal to examine those findings.

ORDER

The portion of the initial decision that affirmed the appellant's removal is REVERSED; the remaining portions of the initial decision are AFFIRMED.

We ORDER the agency to cancel the appellant's suspension effective January 13, 1996, to cancel her removal, and to restore her effective June 14, 1996. See Kerr v. National Endowment for the Arts, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish these with an administrative judge's order to provide actions within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay,

interest on back pay, and other benefits under Postal Service regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply. Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communicate with the agency about compliance. This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113 (c).

NOTICE TO THE APPELIANT REGARDING FURTHER REVIEW RIGHTS, You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. See 5 U.S.C. § 7702 (b) (1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7702 (b) (1)

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims and your other claims in an appropriate United States district court. See 5 U.S.C. § 7702 (b) (2). You should file your civil action with the district court no later than 30 calendar days after receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7702 (b) (2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e5 (f); 29 5 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703 (b) (1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. U.S.C. § 7703 (b) (1).

FOR THE BOARD:

/S/ Robert E. Taylor
Clerk of the Board

Washington, D.C.

FILED
01271 DEC 6 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

Roccine Taylor,

Petitioner(s)

v.

William J. Henderson,
In his official capacity as
Postmaster General for the
United States,

On Petition for Writ of Certiorari
TO THE UNITED STATES COURT OF APPEALS
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

SUPPLEMENT TO THE APPENDIX

Roccine Taylor
6347 Meadowbrook Road
Garfield Hts., OH 44125
(216) 475-4864

Petitioner, *Pro Se*

5908

Opinion Below

(1) The Court of Appeal Rehearing denied on September 7, 2000 (App. 1)

(2) United States District Court, Magistrate Jack B. Streepy, Report and Recommend Decision of Magistrate Judge, February 3, 1999. (App. 2-6)

(3) United States District Court, Judge Donald C. Nugent, notice of marginal entry order, July 8, 1998. (App. 7)

(4) United States District Court, Judge Donald C. Nugent, Order, July 6, 1998. (App. 8-17).

(5) United States District Court, Judge Donald C. Nugent, Judgment Entry, July 6, 1998. (App. 18).

(6) United States District Court Judge Donald C. Nugent, Judgment Entry, July 6, 1998. (App. 19-20).

(7) United States District Court Magistrate Judge Jack B. Streepy, Report and Recommend Decision of Magistrate Judge, June 22, 1998 (App. 21-29).

(8) United States District Court Magistrate Judge Jack B. Streepy, Report and Recommended Decision of Magistrate Judge, June 11, 1998 (App. 30-35).

(9) United States of America Merit System Protection Board, Dissenting opionion of member Antonio C. Amador; Opinion and Order, June 19, 1997. (App.).

(10) United States of America Merit Systems Protection Board Central Regional Office, Initial Decision, November 21, 1996. (App.36-56).

(9) United States of America Merit System Protection Board, Dissenting opionion of member Antonio C. Amador; Opinion and Order, June 19, 1997. (App.).

(10) United States of America Merit Systems Protection Board Central Regional Office, Initial Decision, November 21, 1996. (App.).36-56)

App.1

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROCCINE TAYLOR,	)	FILED:SEP.7,2000
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
WILLIAM J. HENDERSON, in his official capacity as Postmaster General for the United States,	)	
	)	
	)	
	)	
Defendant-Appellee.	)	

Before: KRUPANSKY, NORRIS, and SUHRHEINRICH, Circuit Judges.

Roccine Taylor moves for reconsideration for this court's prior order, which affirmed the dismissal of her civil rights action filed under diverse theories of state and federal law.

Upon review, we conclude that Taylor has not cited any misapprehension of law or fact that would alter our prior decision. *See* Fed. R. App. P.40 (a).

Accordingly, the motion for reconsideration is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green

Clerk

App.2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF
EASTERN DIVISION

ROCCINE TAYLOR,	)FILED:FEB3,1999
	) 1:97CV1884
Plaintiff-Appellant)	
	) JUDGE DONALD E.
v.	) NUGENT (Magistrate
	) Judge Jack B. Streepy)
MARVIN T. RUNYON,	)
etc.	)REPORT AND
	)RECOMMENDED
Defendant	)DECISION OF
	)MAGISTRATE JUDGE

STREEPY, MAG. J.

By previous court order, counts one, four, five, and eight through fifteen have been either dismissed or summary judgment granted thereon. (See docs. 29, 30, 35.) Defendant has now filed a motion to dismiss the remaining claims, i.e., counts two, three, six and seven (doc. 41). The plaintiff, Roccine Taylor (Taylor), has filed a counter motion for summary judgment (doc.42) and arguably two motions to amend the complaint (docs. 32, 33).

Defendant's Motion

Defendant has moved to dismiss the remaining counts on the ground that the complaint fails to state a cause of action upon which relief can

be granted. Taylor has not filed a response to this motion.

The remaining counts are listed in the complaint (see complaint at 37) as "Denied Rights as a Preference Eligible Veteran" (count two), "Denied Rights under the Collective Bargaining Agreement" (count three), "Denied All Procedural Rights" (count six), and "Prohibited Personnel Practices" (count seven).

Count two and six allege that Taylor was denied certain procedural and substantive rights that are due postal workers such as herself. Exhibit 13 attached to the complaint, thus considered to be a part of the complaint, shows the Merit Systems Protection Board (MSPB) found in Taylor's favor and ordered that she be reinstated to her former employment position with back pay.

As a result of the MSPB decision, Taylor has not suffered any denial of her procedural and substantive rights that the MSPB has failed to remedy. Accordingly, counts two and six do not state claims upon which relief may be granted.

Count three contends that Taylor was denied rights under a collective bargaining agreement. The complaint alleges that Taylor was subject to such an agreement which called for a grievance procedure. (See complaint at ¶ 33.) Prior to bringing a federal suit, Taylor must exhaust remedies under that agreement. See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 219 (1985); Kaiser v. United States Postal Services, 908 F.2d. 47, 49 (6th Cir. 1990), cert. denied, 498

(1991); White v. General Electric Co., 121 F.3d 710, 1997 WL 437092 (6th Cir. 1997) (TABLE, text in WESTLAW).

The complaint does not allege that Taylor exhausted the grievance procedure or whether the outcome was binding. Assuming the grievance procedure was exhausted and not binding, there is no allegation in the complaint of how the collective bargaining agreement was violated. Taylor has failed to state a claim in count three upon which relief can be granted.

The remaining count, count seven, alleges prohibited personnel practices as outlined by 5 U.S.C. §§2302 (b) (4), (b) (8) (A), (b) (9) and (b) (10). (Complaint at ¶77.) The postal service is exempt from this provision, see Booker v. Merit System Protection Board, 982 F.2d 517, 519 (Fed. Cir. 1992), cert. denied, 510 U.S. 862 (1993); see also Van Werry v. Merit System Protection Board, 995 F.2d 1048, 1951-52 (Fed. Cir. 1993); Medden v. Runyon, 899 F.Supp. 217, 225 (E.D.Pa. 1995). Count seven should be dismissed.

Plaintiff's Motion

Taylor has filed a counter-motion for summary judgment. The basis of her motion is not clear. Her claim that defendant has failed to filed an answer is not well taken. (See doc. 13.) Her other allegations are not relevant to her motion is not clear. Her claim that defendant has failed to file an answer is not well taken.

doc. 13.) Her other allegations are not relevant to her of defendant's motions.

Taylor filed objections to each report and recommendation (docs. 32, 33). In addition to clearly identifying those documents as objections, she titled each as a motion to amend her complaint. (Id.)

It appears the motions to amend were implicitly denied when the court adopted each report and recommendation. Assuming there has not been a ruling, said motions to amend should be denied in that Taylor did not set forth the legal requirements for amending her complaint, much less show why she should be permitted to amend.

RECOMMENDATION

It is recommended that defendant's motion to dismiss the remaining claims of the complaint (doc.41) be granted and that plaintiff's motions for summary judgment (doc.42) and to amend the complaint (docs. 32, 33) be denied. This recommendation disposes of the entire case.

Dated: February 3, 1999

Jack B. Streepy
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time WAIVES the right to appeal the District Court's order. See Thomas v. Arn, 474 U.S. 140 (1985); United States v. Walters, 638 F.2d.

App.6

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROCCINE TAYLOR,	)1:97CV1884
	)
Plaintiff	)
	)JUDGE DONALDC.
v.	)(Magistrate Judge
	) Jack B. Streepy)
MARVIN T. RUYON,	)
etc.	)
Defendant	)

ORDER

STREEPY, MAG. J.

The above matter was referred by the court for a report and recommended decision, a pretrial hearing or other preliminary matters. This matter has now been concluded, therefore;

IT IS ORDERED that the case referral order is hereby terminated, and the case is returned to the referring judge.

Dated:FEB.3,1999 Jack B. Streepy

United

StateMagistrate

Judge

App.7

UNITED STATES DISTRICT COURT
NORTHERN DISTICT OF OHIO

IN THE MATTER OF: Case : 1:97-cv-01884

Judge Donald C. Nugent -pre
Mag. Judge Jack B. Streepy -ref

Taylor- plaintiff

v.

Runyon- defendant

-

NOTICE OF MARGINAL ENTRY ORDER

Notice To:

Roccine Taylor
6347 Meadowbrook Road
Garfield Heights, OH 44125

** The following ruling was made on 7/8/98 and entered on the docket:

MARGINAL ENTRY ORDER denying in part & granting in part motion by pltf to amend init cmp part II [33-1]. Gr as to mot to amd init cmp & gr to obj's to R&R dec part II. (issued on 7/8/98) Judge Donald C. Nugent

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROCCINE TAYLOR,	)CASE NO. 1:97CV1884
	)
Plaintiff,	)JUDGE DONALD C.
	)NUGENT
v.	)
	)
MAFRVIN T. RUNYON)	
Postmaster General ,	)MEMORANDUM
	)OPINION AND ORDER
Defendant	)

This matter comes before the Court on two Reports and Recommendations (Documents #29 and #30) of a Magistrate Judge of this Court, the first Report (Document #29) submitted on June 11, 1998 recommended that Defendant's Motion for Partial Dismissal (Document #14) be granted: and the second Report (Document #30) submitted on June 22, 1998 recommended that Defendant's Motion for Summary Judgment (Document #21) be granted. For the reasons that follow both Reports and Recommendation are hereby ADOPTED by this Court, along with the findings of fact and conclusions of law therein.

Plaintiff Roccine Taylor filed this *pro se* action on July 18, 1997, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§

2000e-16(c), the Federal Tory Claims Act, 28 U.S.C. § 1346(b), and the Fifth and Fourteenth Amendments to United States Constitution. Plaintiff alleges that Marvin T. Runyon, in his capacity as Postmaster General for the United States, wrongfully suspended and removed her from her position as a postal clerk and retaliated against her for filing an EEOC complaint.

Specifically, Plaintiff filed a thirty-nine (39) page Complaint and on page thirty-seven (37) lists the following causes of action:

(1) Denied Due Process;
(2) Denied Rights As a Preference Eligible Veteran;
(3) Denied Rights Under the Collective Bargaining Agreement;
(4) United States Constitution 5th Amendment;
(5) United States Constitution 14th Amendment;
(6) Denied All Procedural Right;
(7) Prohibited Personal Practices;
(8) Discriminatory Retaliation;
(9) Defamation, Libel, Slander;
(10) Tort of Outrage-Reckless Disregard a Sufficient [*sic*];
(11) Tort of Intentional Infliction of Emotional Distress;
(12) Negligent Infliction of Emotional Distress;
(13) Mental Distress;
(14) Outrageous Conduct;
(15) Mental Distress.

Defendant filed a Motion for Partial Dismissal (Document #14) on December 24, 1997. Plaintiff filed a "Motion to Dismiss Defendant's Motion for Partial Dismissal and a Motion to Strike Defendant's Statements of Facts" on December 30, 1997. Thereafter, Defendant filed a Motion for Summary Judgment (Document #21) on March 6, 1998. Plaintiff filed a Response to Defendant's Motion for Summary Judge Jack B. Streepy for the preparation of a Report and Recommendation. *See* 28 U.S.C. §636(b); Local R. 7.3. Magistrate Judge Streepy issued two Reports and Recommendations, the first Report recommended Defendant's Motion for Partial Dismissal be granted and the second Report recommended Defendant's Motion for Summary Judgment be granted. Plaintiff filed Objections to the Reports and Recommendations. The Reports and Recommendations of The Magistrate Judge, along with Plaintiff's Objections are herein reviewed by this Court.

Factual Background

The following factual summary is based on depositions, affidavits and exhibits filed in this case as well as the very thorough and complete review of the facts in the Reports and Recommendation of Magistrate Judge Streepy. Those material facts which are controverted and supported by deposition testimony, affidavit, or

favorable to Plaintiff, the non-moving party.

Plaintiff initiated an informal discrimination complaint against the United States Postal Service (hereinafter "USPS") with an Equal Employer Opportunity Commission (hereinafter "EEOC") counselor on September 26, 1995. Plaintiff complained to the EEOC about her numerous conflicts with her supervisor Ms. Deborah Noe. The EEOC counselor's report reflects that Ms. Noe was interviewed regarding Plaintiff's complaint. On December 28, 1995, the EEOC filed a formal discrimination complaint against the USPS, based on Ms. Noe's action.

On January 12, 1996, Plaintiff's daughter, Ms. Buchanan telephoned Mr. Bradfield, a manager at USPS. Ms. Buchanan was upset about the problems her mother was having with her USPS supervisors. During the conversation, Ms. Buchanan told Mr. Bradfield she had a gun and threatened to shoot "those people," referring to the USPS managers involved. Ms Buchanan admits making this threat.

Plaintiff learned of her daughter's threats as she referred to them in two statements she made to USPS employees. Ms. Eileen Corman states that Plaintiff told her "[n]ow things have moved from the back burner to the front burner. They weren't going to pay [for sick time] and all of a sudden they pay me. My daughter told someone she would shoot someone." Plaintiff also talked to Custodian Clyde Brown who states that Plaintiff said her daughter had further stated that if anything happened to her daughter were passed on shoot

The USPS conducted a comprehensive investigation and sent Plaintiff a copy of its memorandum. The investigation corroborated the charges in the amended notice. Thus, a notice was sent to Plaintiff of a proposal to remove her from the USPS for conduct unbecoming to a postal worker and for threatening harm to postal employees. On June 8, 1996, the USPS sent Plaintiff a "letter of decision" stating that, after consideration of "all evidence of record, including [her] personal response [which contained] no affidavits or other documentary evidence on [her] behalf," it found the charges against her were "fully supported by the evidence," thus she was removed effective June 14, 1996. The letter informed Plaintiff of her right to appeal the decision to the Merit System Protection Board (hereinafter "MSPB").

Plaintiff filed an appeal. The Administrative Law Judge (hereinafter "ALJ") reversed her suspension on procedural grounds, but affirmed her removal. The ALJ further found that there was no evidence that Plaintiff had been suspended or terminated in retaliation for filing her EEOC complaint.

Plaintiff sought review by the MSPB. The MSPB reversed the ALJ's decision regarding Plaintiff's removal, finding that the USPS had failed to present adequate evidence at the hearing. The MSPB affirmed the remainder of the ALJ's decision, noting in part that Plaintiff had not even contested that portion of the decision which rejected her retaliation claim.

The MSPB ordered the USPS to cancel Plaintiff's suspension, effective January 13, 1996, and to reinstate her effective June 14, 1996. It also awarded Plaintiff back pa with interest and benefits due.

Standard of Review for Magistrate Judge's Report and Recommendation

The applicable district court standard of review for a magistrate's report and recommendation depends upon whether objections were made to that report. When objections are made to a report and recommendation of a magistrate judge, the district court reviews the case *de novo*. FED.R.CIV.P.72(b) provides this standard of review; it states, in pertinent part, the following:

> The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any
> Portion of the magistrate judge's disposition to which specific written
> Objection has been made in accordance with this rule. The district judge
> may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Accordingly, this Court will review the Reports and Recommendation, to which timely

Support Systems, Inc. v. N.L.R.B., 7 F.3d 511 (6th Cir. 1993).

Conclusion

The court has reviewed both Reports and Recommendations of the instant case *de novo*. *See Massey v. City of Ferndale*, 7 F.3d 506 (6th Cir. 1993). The Court has also considered all of the pleading, affidavits, motions, and filings of the parties. This Court adopts the findings of fact and conclusion of law of the Magistrate Judge as its own.

In the first Report and Recommendation, Magistrate Judge Streepy correctly determined that Plaintiff's constitutional and state tort claims lack jurisdiction, and as such, Defendant's Partial Motion to Dismiss should be granted. In *Bush v. Lucas*, 462 U.S. 367 (1983), the Supreme Court declined to create a cause of action for federal employees whose constitutional rights have been violated in the workplace. The Court found that "[b]ecause such claims arise out of an employment relationship that is govern by comprehensive procedural and substantive provisions giving meaningful remedies against the United States," supplementing that regulatory scheme with a new judicial remedy would be inappropriate. *Id.* at 368.

Next, Plaintiff claims the Magistrate Judge erred in recommending that Counts Nine through Fifteen, Plaintiff's state common law claims, are preempted by the PRA and the CSRA. Plaintiff contends that the court has jurisdiction over her tort claims under the FTCA. The Magistrate Judge did not err. The comprehensive scheme provided by the PRA and CSRA preempts Plaintiff's claims under the FTCA. *American Postal Workers*, 940 F.2d at 708. Thus, Plaintiff's Counts Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, and Fifteen are DISMISSED.

Therefore, Defendant's Partial Motion to Dismiss is GRANTED. Accordingly, Plaintiff's constitutional and state tort claims, Counts One, Four, Five, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, and Fifteen are DISMISSED.

In the Second Report and Recommendation, Magistrate Judge Streepy correctly determined that Plaintiff failed to raise a genuine issue of any material fact that she was suspended and removed in retaliation for filing a complaint with EEOC, and as such, Defendant's Motion for Summary Judgment on Count Eight should be granted.

Plaintiff contends that Defendant retaliated against her when she filed a complaint with the EEOC. A plaintiff must prove retaliation by the method set in *McDonnel Douglas Corp. v. Green*, 411 U.S. 792 (1973), and refined in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under federal law, "(1) the plaintiff must establish a *prima facie* case of retaliation; (2) the employer must articulate some legitimate, nonretaliatory reason for

the contested employment action; and (3) the plaintiff must prove that the stated reason was in fact pretext for retaliation." *Johnson v. University of Wisconsin-EAU Claire*, 70 F.3d 469, 478 (7th Cir.). At all times, the Plaintiff bears the burden of persuading the trier of fact that the Defendants intentionally discriminated against her. *Texas Dep't. of Community Affairs v.Burdine*, 450 U.S. 248 (1981). Defendant does not claim that plaintiff is unable to establish a *prima facie* case. Rather, Defendant claims Plaintiff was removed for legitimate, nondiscriminatory reasons, and Plaintiff has no evidence of pretext.

To meet this burden of production, Defendant "need no persuade the [trier of fact] that [he] was actually motivated by the proffered reasons,...but need only to produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by [retaliatory] animus." *Chappell v. GTE Prods. Corp.*, 803 F.2d 261, 266 (6th Cir. 1986) (quoting *Burdine*, 450 U.S. at 254, 257), Defendant states that Plaintiff was removed because of the comments of her daughter and what she stated to employees.

Plaintiff is required to "offer some evidence that Defendant's explanation is pretextual." *Greer v. Sears Roebuck & Co*,No. 94-5502, 1995 WL 283778 at *3 (6th Cir. May 10, 1995). Plaintiff cannot rely on the proximity in time between the date she filed her EEOC complaint and of retaliation, it is not evidence of

Shamrock Chems.Co., 29 F.3d 1078, 1084 (6th Cir. 1994).

Plaintiff argues that Mr. Bradfield's description of Ms. Buchanan's statement is inadmissible hearsay under Federal Rule of Evidence 803(3). The Magistrate Judge correctly determined that this statement is not hearsay since it is offered for its effect on the listener.

Upon a review of the evidence, Plaintiff has not met her burden. Plaintiff has failed to submit any evidence of pretext. The uncontradicted record reflects that on the dates of suspension and removal, the USPS had credible evidence to the effect that Plaintiff's daughter had threatened to shoot USPS supervisors, and Plaintiff approved of her daughter's threats and made a similar threat.

Therefore, Plaintiff has failed to raise a genuine issue of any material fact that she was suspended and removed in retaliation for filing a complaint with the EEOC. Accordingly, Defendant's Motion for Summary Judgment is GRANTED as to Count Eight.

For the foregoing reasons, the Reports and Recommendations of Magistrate Judge Streepy are hereby ADOPTED. Accordingly, Defendant's Partial Motion to Dismiss and Defendant's Motion for Summary Judgment are GRANTED.

IT IS SO ORDERED.

DATED: July 6,1998

DONALD C. NUGENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROCCINE TAYLOR,	) 1:97CV1884
	)
Plaintiff,	) JUDGE DONALD
	) C. NUGENT
v.	)
	)
MARVIN T. RUNYON,	)
Postmaster General ,	)
	) JUDGEMENT
Defendant,	) ENTRY

Pursuant to the Memorandum Opinion and Order of this Court, the Reports and Recommendations of Magistrate Judge Jack B. Streepy (Documents #29 and #30) are ADOPTED. This Court adopts the findings of fact and conclusions of law of Magistrate Judge Streepy as its own.

Consistent with this ruling, Defendant's Motion for Partial Dismissal (Document #14) and Defendant's Motion for Summary Judgment (Document #21) are GRANTED.

Therefore, the remaining issues and claims are returned to Magistrate Judge Jack B. Streepy for pretrial supervision.

IT IS SO ORDERED. DONALD C. NUGENT
United States District
Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROCCINE TAYLOR,	) 197CV1884
	)
Plaintiff-Appellant,	) JUDGE DONALD
	) C. NUGENT
v.	)
	)
MARVIN T. RUNYON,	) ORDER
Postmaster General for the	)
	)
Defendant,	)

The above captioned case is herby returned to Magistrate Judge Jack B. Streepy for pre-trial supervision on the remaining issues (Counts Two, Three, Six, and Seven). The Magistrate Judge is hereby authorized pursuant to the above provisions to: 1) hold a Case Management Conference and Status Hearing; (2) enter and enforce non-dispositive pretrial orders including, but no limited to, orders pertaining to discovery matters; (3)sign all stipulated orders; and (4) rule on all non-dispositive conduct and any necessary evidentiary hearing or other appropriate proceeding," Local R. 5:1.1(h), and file with the Court a report containing his proposed findings and recommendation

App.20

for disposition of case-dispositive motions. The Court reserves the right to rule directly on any matter filed in the within matter.

This case to be returned to this Court when ready for trial unless all parties consent to trial before Magistrate Judge Streepy.

IT IS SO ORDERED.

DONALD C. NUGENT
United States District Judge

DATED: JULY 6,1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROCCINE TAYLOR,	)DATE:JUNE22,1998
	)
Plaintiff-Appellant,	)
	)
v.	) ORDER
	)
WILLIAM J. HENDERSON, in his official capacity as Postmaster General for the United States, Defendant-Appellee.	)

Before: KRUPANSKY, NORRIS, and SUHRHEINRICH, Circuit Judges.

The above matter was referred by the court for a report and recommended decision, a pretrial hearing, or other preliminary matters. This matter has now been concluded, therefore;

IT IS ORDERED that the case referral order is hereby terminated, and the case is returned to the referring judge.

Jack B. Streepy
United States Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROCCINE TAYLOR,	)1:97CV1884
	)
Plaintiff,	)JUDGE DONALD
	)C. NUGENT
v.	)(Magistrate Judge B.
	)Streepy)
MARVIN T. RUNYON, etc.	)
Postmaster General ,	)REPORT AND
	)RECOMMENDED
Defendant,	)DECISION OF
	)MAGISTRATE
	)JUDGE

STREEPY, MAG. J.

Roccine Taylor (Taylor), brings this pro se complaint pursuant to 5 U.S.C. §7703 (b) (2); Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16 (c); the Federal Tort Claims Act, 28 U.S.C. §1346 (b); and the Fifth and Fourteenth Amendments to the United States Constitution. Taylor is an employee of the United States Postal Service (USPS). The complaint names Marvin T. Runyon (Runyon), in his capacity as Postmaster General for the United States, as defendant. The complaint alleges a total of fifteen causes of action alleging various constitutional, tort, and statutory claims all related to Taylor's suspension and removal from her position as a postal clerk.

Incorporated by reference (and attached hereto) is a prior report and recommendation (R&R) that recommends Runyon's motion to dismiss ten causes of action, the constitutional and tort claims, be granted. Five causes of action, designated in the R&R as counts two, three, six, seven, and eight, were not subject to that motion. Currently pending is Runyon's motion for summary judgment (doc.28) on count eight, the retaliation claim which alleges Taylor was suspended and removed in retaliation for filing a claim of discrimination against the USPS.

Summary judgment is appropriate where the entire record "shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c). Non-moving parties may rest neither upon the mere allegations of their pleadings nor upon general allegations that issues of fact may exist. See Bryant v. Commonwealth of Kentucky, 490 F.2d 1273 (6th Cir. 1974). Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), holds that:

> ...Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

The evidence need not be in a form admissible at trial in order to avoid summary judgment, but Rule 56(e) requires the opposing party

to go beyond the pleadings and by [his] own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." Id. at 324.

The Sixth Circuit in Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989), has interpreted Celotex and two related cases, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electric Industrial Co., Ltd. V. Zenith Radio, 475 U.S.574 (1986), as establishing a "new era" of favorable regard for summary judgment motions. Street, at 1479-80, sets forth ten "new era" principles:

1. Complex cases are not necessarily inappropriate for summary judgment.

2. Cases involving state of mind issues are not necessarily inappropriate for summary judgment.

3. The movant must meet the initial burden of showing "the absence of a genuine issue of material fact" as to an essential element of the non-movant's case.

4. This burden may be met by pointing out to the court that the respondent,

having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.

5. A court should apply a federal directed verdict standard in ruling on a motion for summary judgment. The inquiry on a summary judgment motion or a directed verdict motion is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

6. As on federal directed verdict motions, the "scintilla rule" applies, i.e., the respondent must adduce more than a scintilla of evidence overcome the motion.

7. The substantive law governing the case will determine what issues of fact are material, and any heightened burden of proof required by the substantive law for an element of the respondent's case, such as proof by clear and convincing evidence, must be satisfied by the respondent.

8. The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but

must "present affirmative evidence in order to defeat a properly supported motion for summary judgment."

9. The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.

10. The trial court has more discretion than in the "old era" in evaluation the respondent's evidence. The respondent must "do more that simply show that there is some metaphysical doubt as to the material facts." Further, "[w]here the record taken as a whole could not lead a rational trier of fact to find" for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is "implausible."

I. The Relevant Evidence

On September 26, 1995, Taylor initiated an informal discriminaion complaint against the USPS with an Equal Employment Opportunity Commissioner (EEOC) counselor. Taylor primarily complained to him about her supervisor, Deborah Noe (Noe). The counselor's report, dated December 5, 1995, reflects that Noe was

interviewed regarding Taylor's complaint. (Complaint exhibit, hereafter PX, III.)[1] A formal EEOC discrimination complaint against the USPS, based primarily on Noe's actions, was filed on December 18, 1995.

On January 12, 1996, Taylor's daughter Briggitte Buchanan (Buchanan), telephoned John Bradfield, a manager at USPS whom Buchanan knew. (Defendant's exhibit, hereafter DX, A at 53.) Buchanan was upset about the problems her mother, Taylor, was having with her USPS supervisors. During the conversation, Buchanan told Bradfield she had a gun and threatened to shoot "those people," referring to the USPS managers involved. (PX IX at D-E.) Buchanan admits making this threat. (Id. at E-F.)

There is evidence that Taylor soon learned of her daughter's threats because she referred to them in two oral statements she made the same day or the next day to USPS employees.

Eileen Corman (Corman) states that Taylor told her "[n]ow things have moved from the back burner to the front burner. They weren't going to pay me [for sick time] and all of a sudden they pay me. My daughter told someone she would shoot someone." (Id. at F.) Custodian Clyde Brown states that Taylor said her daughter had told "someone downtown" she was going to shoot Noe and another USPS supervisor. Taylor said if anything happened to her daughter, she was going to shoot "that guy."

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1. Both Taylor and Runyon rely primarily on the exhibits attached to the complaint.

thus summary judgment should be entered on the eighth count.

C. Jurisdiction

If the two dispositive motions are granted, four claims remain. None of the four remaining claims allege retaliation. The Federal Circuit Court of Appeals, as opposed to A district court, has exclusive jurisdiction over appeals from final orders of MSPB which do not raise claims of retaliation. 5 U.S.C. §7703 (b) (2) vests jurisdiction in the district court if the order involves a claim of retaliation or, as in this case, if it is mixed with nonretaliation claims. See Afiffi v. United States Dep't of Interior, 924 F.2d 61, 63 (4th Cir. 1991). retaliation for the following reasons. The reversal was not based on contrary evidence, rather, it was due to a procedural error and failure to call a witness. Moreover, despite reversing the suspension and termination, the MSPB found there was no evidence of retaliation, and Taylor has failed to submit any evidence not considered by the MSPB.

Once the retaliation claim has been disposed of, e.g., on a motion for summary judgment, the district court has discretion whether to retain jurisdiction over the other claims or transfer them to the Federal Circuit. I.d. at 64. In exercising that discretion, the district court is

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2. The MSPB reversal of the suspension a termination does not constitute evidence of

guided by factors analogous to those considered in determining whether to retain jurisdiction over pendent state claims after dismissing a plaintiff's federal claims: judicial economy, convenience, fairness to the litigants, and concern for a uniform federal personnel policy. I.d. at 64. It appears that the remaining claims will be decided by the court on the basis of an administrative appeal rather than by a de novo trial. See Ali v. Brown, ____ F.Supp. - ____, 1998 WL 136227, *12 (N.D. I11. 1998). The circumstances herein mandate that this district court retain jurisdiction over th remaining claims. Id. at *10-11; contra Williams v. USPS, case Nos. 92-0404, 1992 WL 296541 (E.D.Pa. Oct. 8, 1992).

RECOMMENDATION

It is recommended that Runyon's motion for summary judgment on ground eight, Taylor's retaliation claim, be granted and that the district court retain jurisdiction over the remaining counts.

Jack B.Streepy
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time WAIVES the right to appeal the District Court's order. See Thomas v. Arn, 474 U.S. 140 (1985); United States v. Walters, 638 F.2d 947 (6th Cir. 1981).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROCCINE TAYLOR,	)1:97CV1884
	)
Plaintiff	)JUDGE DONALD
	)C. NUGENT
v.	)(Magistrate Judge
	)Jack B. Streepy)
MARVIN T. RUNYON,	)
Postmaster General ,	)REPORT AND
	)RECOMMENDED
Defendant,	)DECISION OF
	)MAGISTRATE
	)JUGDE

STREEPY, MAG. J.

The plaintiff, Roccine Taylor (Taylor), brings this pro se action pursuant to 5 U.S.C. §7703 (b) (2), Title VII OF THE civil Rights Act of 1964, 42 U.S.C. 2000e-16 (c), the Federal Tort Claims Act, 28 U.S.C. §1346 (b), and the Fifth and Fourteenth Amendments Runyon, in his capacity as Postmaster General for the United States, as defendant.

Currently pending are (1) Runyon's motion (doc.14) to dismiss Taylor's constitutional and state tort claims for lack of jurisdiction pursuant to Rule 12 (b) (1); and (2) Taylor's motion (doc.15) to dismiss Runyon's motion pursuant to Rule 12(b) (6) and to strike Runyon's statement of the facts pursuant to Rule 12 (f).

Essentially, the complaint alleges Taylor, a black female, was an employee of the United States Postal Service (USPS) who became involved in numerous conflicts with her supervisors, during the course of which she complained to the Equal Employment Opportunity Commission (EEOC). The confrontations culminated in her suspension and subsequent termination.

Taylor appealed her suspension and removal to the Merit Systems Protection Board (MSPB), claiming, inter alia, retaliation for filing her EEOC complaint. The MSPB initially reversed her suspension but affirmed her removal. Upon further review, the MSPB reversed Taylor's removal, affirmed the remainder of the initial decision, and ordered the USPS to reinstate Taylor with back pay, including interest and benefits due.

The complaint is 39 pages in length. On page 37 it lists the following as the causes of action:

[1] Denied Due Process;
[2] Denied Rights As a Preference Eligible Veteran;
[3] Denied Rights Under the Collective Bargaining Agreement;
[4] United States Constitution 5th Amendment;
[5] United States Constitution 14th Amendment;
[6] Denied All Procedural Right;
[7] Prohibited Personal Practices;
[8] Discriminatory Retaliation;
[9] Defamation, Libel, Slander;
[10] Tort of Outrage-Reckless Disregard a Sufficient [*sic*];

[11] Tort of Intentional Infliction of Emotional Distress;
[12] Negligent Infliction of Emotional Distress;
[13] Mental Distress;
[14] Outrageous Conduct;
[15] Mental Distress

Ruyon's Motion

Runyon concedes there is jurisdiction over some claims in the complaint, i.e. those brought pursuant to 5 U.S.C. §7703. However, he contends the court lacks jurisdiction over many of the fifteen claims. He offers authority that dismiss the claims, but not for jurisdictional reasons.

First, Ruyon contends "Congress Has Enacted A Comprehensive Remedial (Def.'s brief at 6.) Taylor's first, fourth, and fifth causes of action are constitutional claims.[1]

In Bush v. Lucas, 462 U.S. 367 (1983), the Supreme Court declined to create a cause of action for federal employees whose constitutional rights have been violated in the workplace. The court found that "[b]ecause such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies again against the United States," supplementing that regulatory scheme with a new judicial remedy would be inappropriate. Id. at 368. The regulatory scheme discussed in Bush includes the

seq.

Bush has been applied to the USPS, which is governed by the Postal Reorganization Act (PRA) and sections of the CSRA incorporated therein. The PRA and CSRA remedies constitute a "comprehensive scheme governing employment relations within the Postal Service" American Postal Workers Union, 940 F.2d 704, 708 (D.C. Cir. 1991). As a result, Bush has been applied to preclude a constitutional cause of action against the USPS. Rather, Taylor is limited to the remedies provided by the comprehensive scheme under PSA and CSRA. See Bradley v. United States Postal Service, 832 F.2d 1061, 1062 (8th Cir. 1987); Roman v. United States Postal Service, 832 F.2d 1061, 1062 (8th Cir. 1987). Accordingly, her first, fourth and fifth causes of action fail to state a claim on which relief can be granted. See Ellis v. United States Postal Service, 784 F.2d 835, 839-840 (7th Cir. 1986).

Next, Runyon contends "Plaintiff's State Common Law Claims are Preempted by the PRA and the CSRA." (Def.'s brief at 8.) Causes of action nine through fifteen sound in state tort law.

Taylor contends the court has jurisdiction over her tort claims under the FTCA. However, the comprehensive scheme provided by the PRA and CSRA preempts her claims under the FTCA. American Postal Workers, 940 F.2d at 708, 709; Kroll v. United States, 832 F.Supp. 199, 202-203 (W.D.

[1]The procedural rights referenced in her sixth cause of action are presumed to exclude rights under the constitution, since

Mich. 1993), aff'd, 58 F.3d 1087 (6th Cir. 1995).

Finally, Runyon contends "The Court Lacks Jurisdiction Over Plaintiff's State Tort Claims Against Marvin T. Runyon In His Official Capacity." Runyon correctly points out that the Postmaster General is not a proper party for a suit brought under the FTCA. See Allgeier v. United States, 909 F.2d 869, 871 (6th Cir. 1990); Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1254, (2d Cir. 1975).

In summary, causes of action nine through fifteen of the complaint fail to state a claim.

Taylor's Motion

Rule 12 (b) (6) permits a defendant to move for dismissal of the complaint for failure to state a claim on which relief can be granted. See Fed.R.Civ.P. 12 (b) (6) advisory committee's note. Taylor's attempt to use it to strike Runyon's motion is procedurally incorrect.

Since a motion to dismiss is not a pleading, Taylor's Rule 12 (f) motion to strike the statement of facts contained therein is also inappropriate. See, e.g., Knight v. United States, 845 F. Supp. 1372, 1374 (D. Ariz. 1993), aff'd 77 F.3d 489 (1996).

Recommendation

It is recommended that Runyon's motion (doc.15) to dismiss Taylor's constitutional and state tort claims (causes of action 1, 4, 5, and 9 through 15) be granted. It is recommended that

motion (doc.14) to dismiss Ruyon's motion and to strike his statement of facts be denied.

Jack B. Streepy
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time WAIVES the right to appeal the District Court's order. See Thomas v. Arn, 474 U.S. 140 (1985); United States v. Walters, 638 F,2d 947 (6th Cir. 1981).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE

ROCCINE TAYLOR, Appellant,	)DOCKET)NUMBERS)CH-0752-96-0267-I-1
v.	)CH-0752-96-0740-I-1
UNITED STATES POSTAL SERVICE, Agency,	)DATE:NOV.21,1996

Roccine Taylor, Garfield Heights, Ohio, pro se
Linda J. Armstrong, Cleveland, Ohio, for the agency

BEFORE
Phillip Miller
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant was a Distribution Clerk with the Cleveland, Ohio Post Office. ON February 9, 1996, the appellant appealed two consecutive suspensions to the Board. On June 14, 1996, the agency removed the appellant. She appealed that action on June 17, 1996.

For the reasons set forth below, I find that the two suspensions constitute a suspension of over 14

also find that the appellant's removal is within the Board's jurisdiction. *See* 5 U.S.C.A. §§ 7511-7513 (West 1996). The appeals were jointed for adjudication and the hearing requested by the appellant was held on October 22, 1996.

The suspension is REVERSED. The removal is AFFIRMED.

BACKGROUD

The appellant was assigned to Cleveland's Lyndhurst-Mayfield Station. She was absent from duty for a few days in late December 1995, and initially did not receive pay for the time she was absent. On Friday January 12, 1996, the appellant's daughter, Briggitte N. Buchanan, called John H. Bradfield, Supervisor, Main Office Window Service, a personal acquaintance of Ms. Buchanan and the appellant, and asked him if he could determine why the appellant had not been paid for the time she was absent. Although denied by Ms. Buchanan, Mr. Bradfield asserts that Ms. Buchanan stated words to the effect that that she had a gun and would "take care of" the station management if her mother did get paid for the she was off. Mr. Bradfield immediately notified the Lynhurst-Mayfield Station manager of the perceived threat and management officials then notified the Postal Inspection Service.

A postal inspector interviewed Mr. Bradfield who the called the appellant to obtain Ms. Buchannan's phone number. He advised the appellant that the postal inspector wanted to contact

gave Mr. Buchaana the requested phone number. Later, the appellant went into a utility room where she had a discussion with Clyde Brown, a maintenance worker. Shortly thereafter the appellant left the area and Mr. Brown told Barbara Shirley, Supervisor, Collection and Delivery (the appellant's supervisor), that the appellant told him of her daughter's call to Mr. Bradfield and stated that if anything happened to her daughter, she was going to shoot "that guy," meaning Mr. Bradfield. The appellant apparently worked Saturday January 13, until 1:30 p.m. when she was notified by telephone by a Supervisor, Ms. Reeves, that she was being placed on emergency suspension.

The agency notified the appellant in writing on January 15, 1996, that she was suspended effective January 13, 1996 at 1:30 p.m. "until advised otherwise" because "a member of [her] family made life threatening statements directed at [the appellant's] immediate supervisor." The following day, January 16, 1996, the agency issued a letter rescinding the January 15th letter and suspending her effective January 16, 1996, because the appellant was "overheard boasting of the statements made by [her] family member" and for making "remarks threatening the safety of the supervisor." *See* notices attached to suspension appeal. The appellant asserts that the agency violated her rights as a preference eligible in effecting the suspensions. The agency asserts that the Board lacks jurisdiction over the suspensions because neither suspension was for more than 14 days and, even if the appellant was suspended for

more than 14 days, the suspensions were canceled and the appellant made whole prior to the time the appellant filed her appeal. The agency investigated the threats allegedly made by the appellant and on May 11, 1996, proposed the appellant's removal based on the charges of conduct unbecoming a postal employee and threatening harms to postal employees.

The appellant replied orally to the notice and on June 8, 1996, Mr. James OBlock, Manager, Customer Service Operations, Cleveland District, issued a Letter Decision sustaining the charges and effecting the appellant's removal on June 14, 1996.

SUSPENSION ANALYSIS AND FINDINGS

Only those matters for which a right of appeal is specifically granted by law, rule, or regulation may be appealed to the Board. 5 U.S.C.A. §7701 (a) (West 1996). Proving jurisdiction is the appellant's burden by a preponderance of the evidence. 5 C.F.R. § 1201.56 (a)(2) (1996). Covered employees, such as the appellant, are entitled to appeal adverse actions, including suspensions of more than fourteen days, to the Board. Moreover, covered employees are entitled to certain statutory protections including 30 days advance written notice, a reasonable time to answer, orally and in writing, the reasons therefore at the earliest practicable date. 5 U.S.C.A. § 7511 (a)(1) (West 1996). The agency failed to follow adverse action procedures in appellant was suspended for more than 14 days.

An agency cannot defeat Board jurisdiction by imposing two short suspensions for the same cause.

See Klimek v. Department of the Army, 3 M.S.R.R. 139, 142 (1980) (the Army imposed nonconsecutive suspensions based on the same reason). The record does not reflect a reason for the appellant's suspension on January 13th. The written suspension notice of January 15, 1996 addresses only Ms. Buchannan's conduct but not the appellant's. The January 16, 1996 notice of suspension addresses both Ms. Buchannan's and the appellant's conduct but gives no reason for canceling the first suspension. The circumstances of the suspensions, as discussed below, lead me to the conclusion that they were, in fact, for the same reason and, therefore, constituted a unified penalty.

Ms. Shirley testified that Mr. Brown told her of the appellant's alleged comments on the day they were made, January 13, 1996, and that she, in turn, told Deborah Noe, Manger, Customer Services, the same day. Thus, it appears that Ms. Noe was aware of the allegation by Mr. Brown at the time the appellant was suspended on January 13th. because it is more reasonable to suspend an employee for her own threatening conduct than the conduct of another, I conclude that it is more likely that the appellant was suspended for her own alleged comments than for her daughter's comments. The first suspension was likely canceled when the agency noticed that the appellant had no been given a valid reason for the suspension. Thus, I further conclude that the suspension began on January 13, 1996 and ran for

The agency representative asserted that the suspension was canceled on January 30, 1996[1], and "Appellant was provide with a salary advance in accordance with the wages she had minded." The agency acknowledges that the earliest the appellant was notified of this action was February 2, 1996, when she visited the labor relations office.[2] I note that on January 30, 1996, a labor relation specialist took action to place the appellant in an administrative leave status effective retroactively to January 16, 1996. See suspension file tab 7, Agency's Motion to Dismiss, exhibit 3. Under Board case law, however, a suspension is not ended until the condition precedent set forth in the notice is satisfied. *See Jones v. United States Postal Service,* 55 M.S.P.R. 491 493 (1992) Here, the appellant was advised that her suspension would run until she was "advised otherwise." The appellant asserts that she was not notified until March 8, 1996, that she would receive back pay for the time she was suspended, and no evidence refutes that statement.

The agency further asserts that the Board also lacks jurisdiction over the suspensions because it canceled both actions and made the appellant whole[3]. Jurisdiction turns on the state of the facts as they stood when an appeal is filed. "Only if the agency returns the appellant to the *status quo ante*, in the same manner as it would have to do in compliance

[1] This assertion was made in support of the agency's argument that the second suspension was only 14 days long.

[2] The notification allegedly was verbal. There is no indication that agency ever issued a written notice canceling any suspension.

with a final Board order, though, is the appeal truly rendered moot." *Merzweiler v. United States Postal Service*, 69 M.S.P.R. 274, 277 (1996). Here, the appellant was not restored to the *status quo ante*). Even assuming that the agency had a compelling reason for failing to return the appellant to duty, 4 it did not award her all of the back pay to which she was entitled.

Both the appellant and her supervisor, Ms. Sharon testified that the appellant was scheduled to work January 15, 1996, a holiday, and the agency offered no evidence in rebuttal. Further, the appellant testified that she did not receive back pay for the overtime she would have worked but for her suspension. This assertion appears to be supported by the agency's Gross Data Information Report and was unrebuted by the agency. *See* suspension file tab 10, exhibit #1; PSDS hours Adjustment Reported, Agency file, tab 7, Exhibit #3. The reports reflect that the appellant received significantly more

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[3] In her March 25, 1996 response to the agency's motion, the appellant argues that the initial notice of January 15, 1996, was procedurally defective, that she was advised on February 5, 1996 that she would receive back pay, but only from January 29, 1996; that it was not until March 8, 1996 that she was advised that she would receive back pay beginning with "pay period 3"

4 An agency may establish a compelling reason for not returning an employee to *status quo ante. Dalton v. Department of Justice*, 66 M.S.P.R. 429 (1995). *See also Jackson v. Department of the Air Force*, 61 M.S.P.R. 432 (1994.

pay for the periods she was on duty than of the period she was suspended. Because the appellant was not made whole through the date of her removal, I find that the Board has jurisdiction over her suspension. Because the agency did not follow adverse action procedures in effecting the suspension, I find action procedurally defective and it is reversed.

REMOVAL ANALYSIS AND FINDINGS5

The May 11, 1996, Notice of Charges identified Charge 1 as "Conduct Unbecoming a Postal Employee" and Charges 2 as "Threatening Harm to Postal Employees." The supporting specifications were contained in an extensive narrative describing events over several months including references to both the appellant and her daughter. The notice referenced a statement allegedly made by Ms. Buchanan in December 1995, in which, referring to the appellant's supervisor, Chris Cooper, she stated she was "gonna give him hell;" Ms. Bkuchannan's and the appellant's "extensive military background;" the appellant's "assaultive behavior by throwing a clipboard at another supervisor6;" a "tiff" between the appellant and another unnamed employee; the appellant's allegation of an "assault" by a supervisor of which an investigation developed no supporting evidence; Ms. Buchannan's alleged threat of January 12, 1996; an otherwise unspecified January 16, 1996 report that the appellant had made "threats

employees;" and the appellant's alleged discussion of her daughter's alleged threats with other employees.

From my review of the proposal notice, I find that the only conduct with which the appellant is specifically charged is that, on January 12, 1996, the appellant stated that if her daughter got into trouble, she would "shoot Bradfield." The agency has the Burden of proving this specification and of showing that the specification supports one or both of the charges by a preponderance of the evidence. 5 C.F.R. § 1201.56 (1996)7.

The agency introduced no evidence that the appellant made any threat-like comments "while talking with several Lyndhurst-Mayfield employees" as alleged in the proposal notice. The only evidence supporting the assertion that the appellant made the comment is the testimony of Ms. Shirley and a hand-written note by Clyde Brown8, Custodian, introduced as Join Exhibit 1 at the hearing. Ms. Shirley testified that on January 13, 1996, she called the appellant to a phone to take a call from Mr. Bradfield, and that a short time later

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5 The agency failed to provide an evidence file after two orders to do so and failed to respond to any of several motions filed by the appellant. Accordingly, I sanctioned the agency by denying the agency the right to introduce evidence or to call witnesses in support of its case in chief. The evidence relied upon in sustaining the removal action was introduced by the appellant or obtained from witnesses called by the appellant.

6 This occurred during the appellant's "[attempt] to learn supervision."

she went to a utility room and found the appellant talking to Mr. Brown about the comments her daughter was alleged to have said; that after the appellant left the area, Mr. Brown told her that the appellant told him that if anything happened to her daughter she (the appellant) was going to shoot Mr. Bradfield. Ms. Shirley testified that Mr. Brown knew the name of Mr. Bradfield only because the appellant used it. The hand-written statement of Mr. Brown is dated "1-16-96" and reads as follows: "On 12 of Dec 96 [sic] Miss Roccine stated to me Clyde Brown that if something happen[ed] to Brigitte, that [sic] was going to shoot Mr. Bradfield." The appellant testified that she did not make the remarks attributed to her.

Because the testimony of the appellant contradicts the evidence submitted by the agency on a central issue, credibility findings must be made in accordance with *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987), *modified*, 54 M.S.P.R.58(1992), *rev's and remanded on other grounds, sub nom. King v. Hillen*, 21 F.3d 1572 (Fed. Cir. 1994). Factors that must be considered, if applicable, include (1) the opportunity and capacity of the witnesses to observe the event or act,, (2) the

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7 A preponderance of the evidence is: "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient find that a contested fact is more likely to be true than untrue." 5 C.F.R. §1201.56 (c)(2) (1996).

8 Although requested as a witnesses by the appellant, Mr. Brown was on sick leave pending retirement and the agency failed to produce him.

character of the witnesses, (3) the effect of any prior inconsistent statement, (4) the possibility of bias on the part of a witness, (5) contradiction by or consistency with other evidence, (6) inherent improbability of an event occurring in the manner described in the testimony, and (7) the demeanor of the witnesses. *Hillen,* 35 M.S.P.R. at 458-62.

Greater weight is normally given to the testimony of first-hand witnesses than to hearsay testimony or unsworn written statements. *See Reniere v. Department of Agriculture*, 62 M.S.P.R. 648, 653 (1994). In this case, however, the attendant circumstances lead me to the conclusion that the evidence presented by the agency is more credible than the testimony of the appellant. Although the written statement of Mr. Brown is less than precise, it unmistakable references the incident between Ms. Buchanan and Mr. Bradfield. The only way Mr. Brown could have learned of the incident that day was through the appellant. Mr. Brown's written statement lends credence to Ms. Shirley's testimony that he advised her of the perceived threat. Accordingly, I find that the agency has supported its assertion that the appellant said she would shoot Mr. Bradfield if anything happened to her daughter.

Before the comment can be found to constitute a threat, it must meet the "*Metz* test." *See Metz v. Department of Treasury*, 780 F.2d 1001, 1004 Fed. Cir. 1986: *Battle v. Department of Transportation*, 63 M.S.P.R. 403, 406 (1994). Under *Metz* the evidentiary factors in deciding

(1) The listener's reactions;
(2) The listener's apprehension of harm;
(3) The speaker's intent;
(4) Any conditional nature of the statement; and
(5) The attendants circumstances.

Metz, 780 F.2d 1002. Although the person against whom the alleged threat was made may not have personally heard the statement, consideration is given to his reactions. *Battle*, 63 M.S.P.R. at 406.

Mr. Bradfield testified that the appellant had worked for him at one time and that they had had an "intimate relationship" and that he was not concerned for his safety. Mr. Brown, however, displayed concerns for the safety of Mr. Bradfield by advising Ms. Shirley to report the comments to Ms. Noe and other officials displayed a genuine concern for the safety of their employees by reporting the incident to the Inspection Service and by removing the appellant from the work place. Although the remarks were conditional, whether something happened to the appellant's daughter, those conditions were not within the control of Mr. Bradfield. The appellant's comments implied serious harm or death to Mr. Bradfield because he appropriately alerted authorities of threat made by her daughter.

I find that the agency has satisfied the *Metz* test. Accordingly, I find that the agency has supported Charge 2, Threatening Harm to Postal Employees, by a preponderance of the evidence. Charge 1, Conduct Unbecoming a Postal Employee, requires a lesser showing on improper conduct than

charge. Accordingly, I find that the specifications set out by the agency support both charges and both charges are sustained.

Affirmative defenses

This appellant alleges that her removal was in reprisal for her having previously filed discrimination complaints against the agency and that it constitutes discrimination
Based on her sex. The appellant has not supported these affirmative defenses. The appellant did not show that the agency has not removed any employee for having made similar remarks or that it lacked sufficient motivation for its action.

An allegation of reprisal is affirmative defense for which the appellant bears the burden of proof by a preponderance of the evidence. 5 C.F.R. § 1201.56 (a) (2) (1996). In order for an appellant to prevail on a contention of illegal retaliation, she has the burden of showing that: (1) she engaged in protected activity; (2) the accused official knew of the protected activity; (3) the adverse action under review could, under the circumstances, have been retaliation and (4) there was a genuine nexus between the alleged retaliation and the adverse action. *Rockwell v. Department of Commerce*, 39 M.S.P.R. 217,222 (1988), citing *Bodinus v. Department of the Treasury*, 7 M.S.P.R. 536, 541 (1981), *aff'd* 785 F.2d 323 (Fed. Cir. 1985), and *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986).

When the first three tests are met, as they are in this case, "a careful scrutiny fo the intensity of [an agency official's] motive to retaliate is necessary under test (4) to be weighed with the gravity of the misconduct charged, or inadequacy of the performance of duties, so that the trier of fact can make an informed and reasoned determination whether the 'nexus' exists." *Warren*, at 658. In *Warren* the court went on to state that an action against an employee should be sustained if "an imaginary supervisor who knew nothing of the [protected activity] would have been led by the objective facts to find petitioner's performance inadequate." *Warren* at 659.

I find that the seriousness of the misconduct weighs in favor of removal of the appellant, even in the presence of a motive for retaliation. I further find that the appellant has not shown a nexus between her removal and her filing of discrimination complaints.

To establish a prima facie case of discrimination on the basis of disparate treatment, the appellant must show that: (1) he of she is a member of a protected group; (2) he of she was similarly situated to an individual who was not a member of he/her particular protected group; and (3) she or she was treated more harshly of disparately than that individual. *See Fenn v. Department of the Army*, 35 M.S.P.R. 362, 366 (1987). The appellant must also show that the difference in treatment was based on the intent to discriminate. *Id.* To be similarly situated, the appellant and a comparative employee or employees must have reported to the same supervisor, been subjected to the same standards

discipline, and engaged in similar conduct without differentiating or mitigating circumstances distinguishing their misconduct or the appropriate discipline for it. *See, e.g., Wynne v. Department of the Army*, 46 M.S.P.R. 320, 327 (1990), *aff'd*, 940 F.2d 677 (Fed. Cir.1991)(Table).

Because the appellant has offered no evidence in support of her bare assertion of sex discrimination, I find that she has not supported this affirmative defense by a preponderance of the evidence.

Efficiency of the service-Nexus

"[A]n agency may take an action covered by [subchapter 75 of title 5 of the United States Codes] against an employee only for such cause as will promote the efficiency of the service." 5 U.S.C.A. § 7513 (West 1980).

> Before it can properly be concluded that a particular penalty will promote the efficiency of the service, it must appear that the penalty takes reasonable account of the factors relevant to promotion of service efficiency in the individual case. Thus, while the efficiency of the service is the ultimate criterion for determining both whether any disciplinary action is warranted and whether the particular sanction may be sustained, those determinations are quite distinct and must be separately considered.

Douglas v. Veterans Administration, 5 M.S.P.R. 280, 303 (1981). A nexus exists between an adverse action and the efficiency of the service when the grounds for the action relate to either an employee's ability to accomplish her duties satisfactorily or to some other legitimate government interest. *Hatfield v. Department of the Interior*, 28 M.S.P.R. 673, 675 (1985).

The appellant's comments were made concerning a coworker and resulted in a disruption of the agency. Accordingly, I find that her misconduct had a direct nexus to the efficiency of the service.

Efficiency of the service-Penalty

The particular sanction imposed may not be arbitrary or unreasonable. *Douglas*, 5 M.S.P.R. at 301, 310. Another formulation of this test is whether "managerial judgement has been properly exercised within tolerable limits of reasonableness." *Douglas*, 5 M.S.P.R. at 302. The sanction imposed must be in consideration of the applicable factors set forth in *Douglas*, M.S.P.R. at 305. Due deference is given to the agency's discretion in exercising its obligation to maintain employee discipline and efficiency. *Richard v. Department of the Air Force*, 43 M.S.P.R. 303, 308 (1990), *aff'd* 918 F.2d 185 (Fed. Cir.1990).

The seriousness of the appellant's conduct is the over riding factor here. Threatening the life of a coworker outweighs any factor that may weigh in favor of the appellant. The Board has consistently held that threats against other employees warrant removal. *Battle vs. Department of Transportation*,

M.S.P.R. 303, 308 (1990), *aff'd* 918 F.2d 185 (Fed. Cir.1990).

The seriousness of the appellant's conduct is the over riding factor here. Threatening the life of a coworker outweighs any factor that may weigh in favor of the appellant. The Board has consistently held that threats against other employees warrant removal. *Battle vs. Department of Transportation*, 63 M.S.P.R. 403, 410 (1994) (threat of "hot piece of lead" for supervisors warranted removal); *Sims v. Department of Defense*, 58 M.S.P.R. 131 (1993) (words to the effect "I'll be looking for his ass" warranted removal); and *Facas v. United States Postal Service, 35* M.S.P.R. 426, 430-31 (1987) (statement to fellow employee that he was going t butcher the postmaster and kill certain others, warranted removal). I find that the removal of the appellant was within the tolerable limits of reasonableness.

DECISION

The agency's suspension action is REVERSED.

The agency's removal of the appellant is AFFIRMED.

ORDER

The agency is ORDERED to cancel the suspension effective January 13, 1996 to the date of removal. This action must be accomplished no

decision becomes final.

The agency is also ORDERED to issue a check to appellant for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. Appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, the agency is ORDERED to issue a check to appellant for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office concerning the disputed amount.

The agency is further ORDERED to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the agency about its intentions.

INTERIM RELIEF

Although appellant is the prevailing party, I have determined not to order interim relief pursuant of Section 6 of the Whistleblower Protection Act of 1989, 5 U.S.C. § 7701 (b)(2)(A) in light of the affirmed removal.

FOR THE BOARD: Phillip Miller
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on December 26, 1996, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, of the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the Administrative Judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to th agney, your petition will be rejected and returned to you.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Offices of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Actor under the Rehabilitation Act, you must file your appeal with the appropriate United

If you choose not
decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
For the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court of appeals before this decision becomes final. To be timely, your petition must be received by the court appeals no later than 30 calendar days after the date this initial decision becomes final.